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IN THE

Supreme Court of the United States

October Term, 1963

No. 555

GENERAL INSTRUMENT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MURRAY GARTNER
Attorney for Petitioner
598 Madison Avenue
New York 22, New York

JESSE FREIDIN
HERBERT PRASHKER
ERIC ROSENFELD
598 Madison Avenue
New York 22, N. Y.
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions and Orders Below	2
Jurisdiction	2
Questions Presented	3
Statute, Rules and Regulations and Statements of Procedure Involved	4
Statement of the Case	4
Reasons for Granting the Writ	9
Conclusion	22
Appendix A	1a
Order of the Court of Appeals Denying Rehearing	1a
Petition for Rehearing	2a
Decree of the Court of Appeals	13a
Opinion of the Court of Appeals	15a
Board's Decision and Order to Bargain	21a
Board's Order Denying Reconsideration	30a
Board's Decision on Review, Order and Decision	32a
Regional Director's Decision and Direction of Elections	35a
Appendix B	48a
National Labor Relations Act, as amended	48a
Section 8(a)(5)	48a
Section 9(a)	48a
Section 9(b)	48a
Section 9(c)(1)	48a
Section 9(c)(5)	49a
Section 9(d)	49a

PAGE

NLRB, Rules and Regulations, Series 8, as amended 50a
Section 102.60 50a
Section 102.63 50a
Section 102.64 51a
Section 102.67 51a
Section 102.68 53a

NLRB, Statements of Procedure, Series 8, as amended 53a
Section 101.17 53a
Section 101.18 54a
Section 101.20 55a
Section 101.21 55a

TABLE OF AUTHORITIES

Cases:

DIFCO Laboratories, Inc., 129 N. L. R. B. 887 (1960) 11

General Instrument Corp., 140 N. L. R. B. No. 6 (1962) 2
General Instrument Corp. v. NLRB, 319 F. 2d 420 (4th Cir. 1963) 2

Kearney & Trecker Corp. v. NLRB, 209 F. 2d 782 (7th Cir. 1953) 20, 21

Liggett Drug Co., 110 N. L. R. B. 949 (1954) 11

May Dep't Stores Co. v. NLRB, 326 U. S. 376 (1945) 13

NLRB v. J. I. Case Co., 201 F. 2d 597 (9th Cir. 1953) 20
NLRB v. National Truck Rental Co., 239 F. 2d 422 (D. C. Cir. 1956), *cert. den.*, 352 U. S. 1016 (1957) 20
NLRB v. White Constr. & Eng'r Co., 204 F. 2d 950 (5th Cir. 1953) 20

PAGE

O. D. Jennings & Co., 68 N. L. R. B. 516 (1946) 12, 20

Packard Motor Car Co. v. NLRB, 330 U. S. 485 (1947) 13

Reynolds Elec. & Eng'r Co., 133 N. L. R. B. 113 (1961) 6, 7, 8, 10, 11, 16

S. H. Kress & Co., 137 N. L. R. B. 1244 (1962) 20

Tele-Dynamics Div., American Bosch Arma Corp., 132 N. L. R. B. 748 (1961) 11

Vickers, Inc., 124 N. L. R. B. 1051 (1959) 11

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*)
- Section 9(b) 2, 3, 13
- Section 9(c)(1) 3, 9, 13, 20, 21
- Section 9(c)(5) 3, 8, 14, 18
- Section 9(d) 3, 20, 21

Miscellaneous:

H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 18–19

N. L. R. B., Statements of Procedure, Series 8, as amended (29 C. F. R. 101.1, *et seq.*)
- Section 101.17 12
- Section 101.18(a) 12

N. L. R. B., Twenty-Seventh Annual Report (1962) 13

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

General Instrument Corporation (the "Employer") petitions for a writ of certiorari to review a decree of the Court of Appeals for the Fourth Circuit enforcing an order of the National Labor Relations Board (the "Board") directing the Employer to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-

CIO (the "I. U. E."). The order is based on an earlier determination by the Board that certain technical employees of the Employer constitute a unit appropriate for purposes of collective bargaining under Section 9(b) of the National Labor Relations Act, as amended (the "Act"). 61 Stat. 136, 29 U. S. C. 151, *et seq.*

Opinions and Orders Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 15a-20a) is reported at 319 F. 2d 420. The Board's decision and order to bargain (App. A, pp. 21a-29a) is reported at 140 N. L. R. B. No. 6. The Board's decision on review, order and direction (App. A, pp. 32a-34a) and its order denying reconsideration (App. A, pp. 30a-31a), are unreported. The Regional Director's decision and direction of elections (App. A, pp. 35a-47a) is unreported.

Jurisdiction

The decree of the Court of Appeals (App. A, pp. 13a-14a) was entered on June 3, 1963. Its order denying rehearing (App. A, p. 1a) was entered on July 17, 1963. The jurisdiction of this Court is invoked under Sections 1254(1) and 2101 of the Judicial Code. (Act of June 25, 1948, c. 646, secs. 1254(1), 2101; 62 Stat. 928, 961; 28 U. S. C. 1254(1), 2101.)

Questions Presented

1. Whether the Board acted arbitrarily and improperly exercised its duty under Section 9(b) of the National Labor Relations Act to determine appropriate bargaining units, when, in a case before it on the petition of a union, it made a different unit determination from that which it would have made were the same case before it on the petition of an employer.

2. Whether the Board, in replacing its Regional Director's finding that technical and professional employees forming "a homogeneous, clearly identifiable group with distinctive work interests" constitute an appropriate unit, with the finding that the technical employees alone constitute an appropriate unit, on the ground that the union failed to show interest among the professional employees, allowed the extent of organization of the affected employees to control the unit determination, in violation of Section 9(c)(5) of the Act.

3. Whether the Board violated Section 9(c)(1) of the Act, when it so replaced its Regional Director's finding, and whether the Court of Appeals' affirmance of the Board's order was contrary to Section 9(d) of the Act, since the union's failure to make a showing of interest did not constitute a part of the record of the Board's hearing.

Statutes, Rules and Regulations and Statements of Procedure Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), N. L. R. B. Rules and Regulations, Series 8, as amended (29 C. F. R. 102.1, *et seq.*), and N. L. R. B. Statements of Procedure, Series 8, as amended (29 C. F. R. 101.1, *et seq.*), are set forth in Appendix B, *infra*, pp. 48a-55a.

Statement of the Case

A. *The I. U. E.'s Petition.* On September 11, 1961 the I. U. E. filed with the National Labor Relations Board under Section 9(c) of the Act a petition which, as amended during the three-day hearing which the Regional Director held on October 2, 4 and 6, 1961, requested certification as bargaining representative for a unit composed of technical employees of the Employer's Thermo-Electric Division. (App. A, p. 23a).

B. *The Thermo-Electric Division and its Employees.* One of the Employer's plants is located at Newark, New Jersey. That plant houses the operations of three of the Employer's Divisions: the Automatic Manufacturing Division, the Semi-Conductor Division, and the Division here involved, the Thermo-Electric Division. (App. A, p. 36a).

The Thermo-Electric Division is a relatively small operation, employing 30-35 people, devoted to research and

development in the areas of thermo-electric and nuclear devices and phenomena. Its employees have no bargaining history. (App. A, p. 36a).

At the time the representation petition of the I. U. E. was heard, 32 employees worked in the Thermo-Electric Division; 17 of them were in "engineering" classifications and 15 were in "laboratory" classifications. (App. A, p. 37a). The work and the relationships of those 32 employees were the subject of considerable evidence, from which the Regional Director made detailed and undisputed findings, including the following:

(i) "All these [engineering and laboratory] employees work in the same general area, and all work in close collaboration as a team in the performance of their duties under the general supervision of Barmat [Division Manager]." (App. A, p. 41a).

(ii) "* * * employees in the engineering classifications perform every operation in the division and the laboratory employees at times perform work normally considered to be engineering work, such as heat transfer analysis, computer quoting, calculations of a complex nature, drafting and designing work and buying of parts and equipment." (App. A, p. 41a).

(iii) "* * * frequently, where more than one employee is required for an operation, an engineer and a technician work together jointly rather than two technicians or two engineers." (App. A, p. 41a).

(iv) "It is also a common occurrence to have senior engineers, senior technicians and laboratory technicians work side by side performing the same work." (App. A, pp. 41a-42a).

(v) "* * * all employees in the Thermo-Electric Division receive the same holidays, hospitalization and family death benefits. * * * All of the employees punch time clocks except the project engineers." (App. A, p. 41a).

(vi) "The foregoing establishes that the employees in the Employer's Thermo-Electric Division [both engineering and laboratory employees] constitute a homogeneous, clearly identifiable group with distinctive work interests * * *." (App. A, p. 42a).

C. *The Regional Director's Decision.* On the basis of his specific findings, which, additionally, included findings that the engineering employees were professional employees within the meaning of Section 2(12) of the Act and that the laboratory employees were not professional employees but were technical employees, the Regional Director decided that all the employees in the Thermo-Electric Division, both engineering and laboratory, constituted an appropriate bargaining unit. (App. A, pp. 42a-44a.)

In making his decision, the Regional Director relied specifically on *Reynolds Electrical & Engineering Company, Inc.*, 133 N. L. R. B. 113 (1961), a case similarly involving a group of professional and technical employees working as a "homogeneous, clearly identifiable group with distinctive work interests." (133 N. L. R. B. at 114). There, on the petition of the employer, following a demand for recognition by the union for a unit of technical employees only, the Board held that despite the union's desire to represent only the technical employees, the appropriate unit should include both professionals and technicals. The Regional Director here made the same determination.

D. *The Board's Decision on Review.* Following the I. U. E.'s Request for Review of the Regional Director's decision, the Board, on March 27, 1962, issued its Decision on Review, Order and Direction (App. A, *infra*, p. 32a), in which it noted "[t]here is no dispute as to the Regional Director's findings" (App. A, p. 33a), but rejected the unit of professionals and technicals found appropriate by the Regional Director because "the [I. U. E.] has no showing of interest among the professional employees," distinguishing the *Reynolds Electrical* case, *supra*, on the ground that the petitioner there was the employer and no showing of interest was required.

E. *Unfair Labor Practice Proceedings; Review by the Court of Appeals.* To secure review of the Board's unit determination, the Employer refused to bargain with the I. U. E. for that unit, and after the institution of unfair labor practice proceedings, the Employer, the I. U. E. and the Board's General Counsel, "to avoid unnecessary costs and delay," entered into a "Stipulation of Fact in Lieu of Hearing," waived hearing and oral argument before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, the issuance of an Intermediate Report and Recommended Order, and oral argument before the Board, and moved that the proceedings be transferred to the Board. (App. A, p. 22a) On September 25, 1962, the Board granted the parties' motion to transfer the case to the Board. (App. A, p. 22a)

On December 19, 1962, the Board issued its Decision and Order, noting that the Employer's defense to the unfair labor practice complaint "is concerned solely with the Board's unit determination" (App. A, p. 25a), and concluded, on the basis of its earlier determination in that

case, that the Employer had been guilty of an unlawful refusal to bargain with the I. U. E. as the exclusive representative of an appropriate unit of employees (App. A, p. 25a). It accordingly directed the Employer to bargain collectively with the I. U. E. with respect to that unit.

On December 26, 1962, the Employer filed its Petition for Review in the Court of Appeals. The Board filed a cross-petition for enforcement on February 6, 1963.

F. *The Decision Below; Rehearing Denied.* On June 3, 1963, the Court of Appeals entered its judgment denying the Employer's petition for review and granting the Board's cross-petition for enforcement.

The Court held that the Board had not violated Section 9(c)(5) of the National Labor Relations Act by giving controlling effect to the extent of organization in determining the appropriate unit, although the only reason advanced by the Board for replacing the unit of professionals and technicals found appropriate by its Regional Director by a unit composed only of technicals was that the I. U. E. had made "no showing of interest among the professional employees" (App. A, p. 33a). The Court also held that the Board's instant decision was not arbitrarily inconsistent with the Board's decision in the *Reynolds Electrical* case, 133 N. L. R. B. 113 (1961), because in *Reynolds*, the employer filed the representation petition, whereas in this case, the union filed the petition. Petition for rehearing was denied on July 17, 1963.

Reasons for Granting the Writ

1. In affirming and enforcing the determination of the Board that the composition of the appropriate unit for bargaining may properly depend on whether it was the employer or the union which filed the representation petition, the Court of Appeals has wrongly decided a question important in the administration of the National Labor Relations Act, which has not been, but should be, decided by this Court, and has permitted an arbitrary determination of unit appropriateness, contrary to the decisions of this Court.

Section 9(c)(1)(A) and (B) of the Act (App. B, *infra*, pp. 48a-49a), allows a petition to be filed either by a union, on the employer's declining to honor its claim as exclusive bargaining representative, or by an employer, on the union's presentation of such a claim. On the filing of a petition by either union or employer, the Board must investigate, provide for a hearing if it has reasonable cause to believe the petition presents a question of representation affecting commerce, and direct an election and certify its results if the record of the hearing shows that such a question exists. National Labor Relations Act §9(c)(1), 29 U. S. C. §159(c)(1). The Act prescribes but one manner for the Board to treat a petition, whoever files it.

The Board, in this case, however, despite a record which established that the Employer's professional and technical employees in the Thermo-Electric Division together constitute "a homogeneous, clearly identifiable group with distinctive work interests" (App. A, p. 42a), nevertheless found that the technical employees alone were a unit appro-

priate for bargaining purposes, because the petition for representation had been filed by the union, with a showing of interest in the technical employees alone. As to its own recent case of *Reynolds Elec. & Eng't Company*, 133 N. L. R. B. 113 (1961), on which the Board's Regional Director relied in finding a single unit of technicals and professionals appropriate, the Board recognized that it was necessary to try to distinguish it, and did so on the ground that, in *Reynolds*, the representation petition had been filed by the employer, and the union, therefore, had not been required to make a showing of interest. In *Reynolds*, however, the union also, like the union here, had sought a unit of technicals only, and in *Reynolds*, as here, the record showed that the technicals were but part of a department and that they, together with professionals, constituted a "homogeneous" unit.

In the face of these indistinguishable facts, the Board here did what it refused to do in *Reynolds*: it found that the technicals, alone, constitute an appropriate unit. It did this, not on any showing or finding that the technical employees were not homogeneously related to the professionals, but simply and solely on its assertion that *Reynolds* was distinguishable because there the employer filed the petition. In other words, the Board here excluded the professionals from an otherwise appropriate unit, and found the truncated, and otherwise inappropriate unit, appropriate because the union, in filing its petition, had not made any showing of interest in the professionals. That ground for determination of appropriateness of unit *differs radically* from the Board's method of decision in previous cases in which unions had filed petitions, with no showing of interest in professionals. In those cases in which the Board

found a unit of non-professionals appropriate, it did so on the basis of the record facts as to those employees, not because it excluded the professionals from a homogeneous, appropriate unit. *Tele-Dynamics Div., American Bosch Arma Corp.*, 132 N. L. R. B. 748 (1961); *DIFCO Laboratories, Inc.*, 129 N. L. R. B. 887 (1960); *Vickers, Inc.*, 124 N. L. R. B. 1051 (1959); *Liggett Drug Co.*, 110 N. L. R. B. 949 (1954).

The Court of Appeals approved the Board's arbitrary method of finding appropriateness in the remnant of a homogeneous group by excluding the professionals who were integrated in the work of that group, by saying that "*Reynolds* is factually distinguishable. In *Reynolds* the employer filed the petition." The Court of Appeals did not attempt to say, any more than the Board did, that *Reynolds* was distinguishable because in *Reynolds*, the technical employees were part of a homogeneous group, whereas in this case, they were not. Neither Court nor Board could say that because the record conclusively shows otherwise. The only "factual" distinction the Court could find was that the employer filed the petition in *Reynolds*, and the union filed the petition here.

The Court of Appeals went on to justify the Board's right to require a showing of interest by the union in a union petition case while not making a similar requirement in an employer petition case. Petitioner did not, however, challenge that right below and does not do so here. What petitioner does challenge is the Board's right, as affirmed by the Court of Appeals, to use the union's showing of interest as the reason for deciding that the unit in which the union is interested is appropriate, while, at the same time, it decides in a case indistinguishable on its facts,

that a similar unit is inappropriate, and justifies both decisions on the sole ground that, in the latter case, its procedures did not require any showing of interest.

Showing of interest is evidence, usually in the form of signed cards, that employers have authorized the union to represent them. Sometimes termed "evidence of representation" in the Board's Statements of Procedure (Secs. 101.17, 101.18(a), App. B, *infra*, p. 54a), showing of interest is required of a union petitioner,

> "it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees." (App. B, p. 54a)

It is not required of an employer petitioner. (App. B, pp. 54a-55a)

Showing of interest, then, heretofore has had but a single and circumscribed function. In union petition cases only, it is used

> "to enable the Board to determine for itself whether or not further proceedings are warranted, and to avoid needless dissipation of the Government's time, effort and funds." *O. D. Jennings & Company*, 68 N. L. R. B. 516, 518 (1946).

Using lack of adequate showing of interest as ground for not directing an election in a unit which hearing has shown to be appropriate is one thing. The Board does it frequently, in cases where the unit it finds appropriate is larger than or substantially different from the unit initially sought by the union. In such cases, the Board either permits the union to withdraw its petition, or allows

the union a set time within which to establish a sufficient showing of interest or suffer its petition to be dismissed. N. L. R. B. Twenty-Seventh Annual Report (1962), p. 45.

Using lack of showing of interest, not as ground for not directing an election in a unit found appropriate, but as ground for giving the union an election in a smaller, otherwise inappropriate, unit, is quite another thing. That involves use of the showing of interest requirement to *determine* the unit in which to direct an election, a function it may not properly serve.

The double standard which the Board has loosed in this case could materially affect the outcome of the large numbers of cases, arising under Section 9(c) of the Act, in which the Board is called upon to exercise its Section 9(b) duty to decide appropriate units.* The decision of the Court of Appeals, moreover, does not indicate which standard the Board will apply in a case initiated by a union petition, and followed by an employer petition. Any rule of decision of appropriateness of units which depends on the arbitrary factor of the identity of the petitioner and, in the case of union petitions, arbitrarily permits a finding of appropriateness as to a unit otherwise inappropriate because only part of a homogeneous whole, is contrary to the decisions of this Court that a Board unit determination may not stand if it is arbitrary. *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 491-2 (1947); *May Dep't Stores Co.* v. *NLRB*, 326 U. S. 376, 380 (1945).

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* In the fiscal year ended June 30, 1962, the Board and its Regional Directors determined the appropriate unit in 1939 union petition cases and 119 employer petition cases filed under Section 9(c)(1)(A) and (B), respectively. N. L. R. B. Twenty-Seventh Annual Report (1962), p. 272.

2. In affirming and enforcing the Board's decision that, because it excluded the professionals from the unit, the technical employees alone constituted an appropriate unit, although the record, without dispute, shows homogeneity of professionals and technicals, such exclusion by the Board being based solely on the lack of showing of interest by the union, the Court of Appeals not only allowed extent of organization to be controlling, contrary to Section 9(c)(5) of the Act, but affirmed the Board's decision on an erroneous statement that the Board had made findings which it did not make, and thus so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The Court of Appeals answered the Employer's contention that the Board, in deciding that a unit of technical employees alone was appropriate, had given controlling effect to the extent of organization achieved by the I. U. E., by saying:

> "In reversing the decision of the Regional Director, the Board indicated that it was giving consideration to the union's unwillingness to represent the professionals and to the fact that there was no 'showing of interest' among the professionals for representation by the union. It is claimed that in so doing the Board violated §9(c)(5) of the Act, 29 U. S. C. A. §159(c)(5), by giving controlling effect to the extent to which the employees had organized. If it were true that these reasons were the sole basis for the Board's decision, a serious question as to the validity of the Board's order would result. *N. L. R. B.* v. *Glen Raven Knitting Mills, Inc., supra*; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 422-423 (1947); *Allis-*

Chalmers Mfg. Co. v. *N. L. R. B.*, 162 F. 2d 435, 439 (7 Cir. 1947). We think the record indicates that the Board did apply proper reasons in deciding the issue. The courts have often held that although the extent of organization may not be controlling, it may be a factor; e.g., *N. L. R. B.* v. *Quaker City Life Insurance Co.*, —— F. 2d —— (4 Cir. 1963), and cases therein cited."

The Board's Decision, however, makes it clear that the Board had not simply given "consideration" to the union's unwillingness to represent the professionals and to its lack of showing of interest among them. The Board's Decision (App. A, p. 33a) says:

> "It is clear that the Petitioner seeks to represent only the technical employees and does not desire to represent the professionals. Moreover, where as here, the Petitioner has no showing of interest among the professional employees, the Board will not direct an election among them to ascertain whether they wish to be joined in the same unit with non-professionals. In these circumstances, we find that the requested unit limited to the technical employees is appropriate * * *."

These words can mean only that the Board did not merely give consideration to the union's lack of interest in the professionals, but *because* of that lack of interest, severed the professionals from the single homogeneous unit of professionals and technicals and found the remaining segment appropriate. No other reason appears in the Board's decision to explain why the severed technical employees were an appropriate unit. The reasons of lack of interest and unwillingness to claim representation rights *were* the "sole basis for the Board's decision" and, therefore, as the Court of Appeals recognized, "a serious ques-

tion as to the validity of the Board's order would [and does] result." (App. A, p. 19a)

Having asserted that the Board applied proper reasons in deciding the issue of appropriateness, despite the fact that no such reasons appear in the Board's decision, the Court of Appeals then makes explicit the reasons which it had in mind. The Court starts by saying that "[n]one of the parties in the case have questioned the correctness of the Regional Director's findings of the basic historical facts * * *" and that "the evidence conclusively supports them" (App. A, p. 19a). Those basic findings compelled the Regional Director to conclude that the professional and technical employees constitute a homogeneous unit and to reject the I. U. E.'s request for a unit comprised only of the technical employees.

The Regional Director did not, as the Court of Appeals' opinion says, make a "choice" (App. A, p. 20a) of the larger unit; in determining the mixed unit to be appropriate, in the face of the union's desire for a unit of technical employees only, he necessarily rejected the appropriateness of such a smaller unit. Nor did he, as the Court of Appeals' opinion says, make an "alternative decision that a unit of the technicals alone would be an appropriate unit" (App. A, p. 20a). The Regional Director, following the Board's own decision in the *Reynolds* case, *supra*, 133 N. L. R. B. 113 (1961), found that a unit of technical employees alone would be appropriate only if the professionals voted against inclusion in the appropriate unit of professional and technical employees (App. A, p. 46a).

In its efforts to supply a proper foundation for the Board's decision which does not exist, the Court of Appeals said that "[t]he Board's opinion * * * clearly though im-

pliedly adopts" "the Regional Director's findings of the basic historical facts" (App. A, pp. 19a-20a, 19a), and also says that the Board's decision "is amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision that a unit of the technicals alone would be an appropriate unit" (App. A, p. 20a).

We have already seen that the Regional Director made no such alternative decision, and it is clear that neither he nor the Board made any findings to support such a putative alternate decision. Another part of the Court of Appeals' opinion shows the findings which it thought necessary to support the Board's order were that "[t]he technicals are sufficiently cohesive as a unit and at the same time sufficiently distinct from the professional engineers to permit separate bargaining units", and that "sufficient distinctions between the technicals and the professionals exist to support a separation" (App. A, p. 18a). The insuperable difficulty with the Court's holding that the Board adopted such findings as among those made by the Regional Director is not only that the Regional Director did not make any such findings, but that he found precisely the opposite. He found that "the employees in the Employer's Thermo-Electric Division constitute a homogeneous, clearly identifiable group with distinctive work interests" (App. A, p. 42a), in short, that sufficient distinctions do *not* exist to support a separation.

Without any findings of the kind which the Court of Appeals said were necessary to support the Board's order, we are thrown back to the reason which the Board itself gave for its decision: that, "[i]n these circumstances"—*i.e.*, that the I.U.E. "seeks to represent only the technical

employees" and "has no showing of interest among the professional employees"—"we find that the requested unit limited to the technical employees is appropriate" (App. A, p. 33a). "Showing of interest" is but a way to write "extent of organization" which Section 9(c)(5) of the Act provides shall not control a unit determination. A union shows interest by supplying to the Board evidence that employees have authorized it to represent them. It can hardly supply such evidence for employees whom it has not organized. Interest, in a word, is organization.

When, thus, the Board invokes the I.U.E.'s failure to show interest among the professionals as reason to reject the Regional Director's finding that they, together with the technicals, constitute an appropriate unit, its determination is being controlled by extent of organization. This hardly veiled reliance on extent of organization is not unprecedented in the history of the Act's administration. Indeed, overt reliance by the Board on that fact was noted by Congress in the deliberations leading to inclusion of Section 9(c)(5) in the Labor Management Relations Act, 1947:

> "Section 9(f)(3) [identical to present Section 9(c)(5)] strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 N. L. R. B. 852 (1939); *Matter of Botany Worsted Mills*, 27 N. L. R. B. 687 (1940)). While the Board may take into consideration the extent to which employees have organized, this evidence

> should have little weight, and as section 9(f)(3) provides, is not to be controlling." H. R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947).

The Court of Appeals, in affirming the Board's order, necessarily sanctions the Board's present overt and explicit reliance on extent of organization as the only and, therefore, controlling reason for eliminating the professionals from a homogeneous unit. The efforts of the court below to establish other findings and reasons for the Board's decision which do not appear, and cannot be read into the Board's decision, is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. For, by finding different and non-existent grounds for the Board's decision, the Court of Appeals has effectively made a nullity of the statutory right of judicial review of such Board orders and, after the event, deprived the Employer of any opportunity to challenge, before the Board, the findings which the Court says the Board made, for the simple reason that the Board never made them.

3. In affirming and enforcing the Board's order which was in fact based upon the lack of a showing of interest among the professionals by the union, the Court of Appeals has permitted a matter which is not in the record of the hearing to furnish a basis for the Board's decision, contrary to Sections 9(c)(1) and 9(d) of the Act, and has thus again so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Nothing is more clear than that the Board now uniformly refuses to include the matter constituting a union's showing of interest in the record of its hearings on representational matters; nor will the Board give an employer access to that evidence or opportunity to litigate its nature or sufficiency. See, *e.g., O. D. Jennings & Co.*, 68 N. L. R. B. 516, 517-8 (1946); *S. H. Kress & Co.*, 137 N. L. R. B. 1244, 1248 (1962). This treatment of showing of interest has been consistently upheld by the courts. *NLRB* v. *National Truck Rental Co.*, 239 F. 2d 422 (D. C. Cir. 1956), *cert. den.*, 352 U. S. 1016 (1957); *NLRB* v. *White Constr. & Eng'r Co.*, 204 F. 2d 950 (5th Cir. 1953); *NLRB* v. *J. I. Case Co.*, 201 F. 2d 597 (9th Cir. 1953); see *Kearney & Trecker Corp.* v. *NLRB*, 209 F. 2d 782 (7th Cir. 1953).

In *Kearney & Trecker*, *supra*, the Court denied an employer's motion to expand the record of the case to include showing of interest evidence because Section 9(d) of the Act required the Board to certify only the hearing record, which the court held did not include that evidence. The court said that if it had granted the motion, the inclusion of the showing of interest evidence

> "would undoubtedly be met by a successful challenge that the Board had exceeded its authority and that

> the petitioner had been deprived of due process because the Board had taken into consideration matters developed in the preliminary investigation, to which the petitioner was not a party and in which it had no opportunity to be heard." 209 F. 2d 782, at 787.

Since it clearly appears from the Board's decision herein that it based its determination on the lack of showing of interest—and, for purposes of Section 9(c)(1), it does not matter whether the Board's reliance was controlling or only partial—there would appear to be no doubt that the court below permitted the Board's decision, and its own decree, to rest in part on matter not in the record of the hearing, contrary to Sections 9(c)(1) and 9(d) of the Act. Petitioner has no way of knowing whether the I. U. E. in fact made no showing of interest as to the professional employees or whether initially such a showing was made and perhaps withdrawn. It is for these reasons that the court in *Kearney & Trecker, supra*, said that inclusion of showing of interest evidence in the record "would undoubtedly be met by a successful challenge that the Board had exceeded its authority and that the petitioner had been deprived of due process" because of the Board's reliance on matters as to which no opportunity to be heard had been afforded to the employer.

In permitting the Board to rely upon showing of interest evidence as a factor in its decision of appropriateness of unit, the Court of Appeals has, for the very reasons given by the court in *Kearney & Trecker*, deprived petitioner of due process. Such a departure from the usual course of judicial proceedings calls for the exercise of this Court's power of supervision.

Conclusion

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York
October 15, 1963

Respectfully submitted,

MURRAY GARTNER
Attorney for Petitioner

JESSE FREIDIN
HERBERT PRASHKER
ERIC ROSENFELD
Of Counsel

APPENDIX A

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8869

GENERAL INSTRUMENT CORPORATION,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

The court, upon consideration of the petition of General Instrument Corporation, Petitioner, hereby denies a rehearing.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

J. SPENCER BELL
United States Circuit Judge.

Dated:
Filed July 17, 1963
R. M. F. WILLIAMS, JR.,
Clerk

Appendix A

Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[SAME TITLE]

Introduction

General Instrument Corporation (the "Employer") petitions for rehearing (Rule 19 of Rules of Court) of its petition for review of an order of the National Labor Relations Board (the "Board") finding the Employer guilty of the unfair labor practice of refusal to bargain (140 NLRB No. 6; JA* 50), and of the Board's cross-petition for enforcement of that order. The Board's order directed the Employer to bargain collectively with the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the "IUE") as the representative of technical employees in the Thermo-Electric Division of its Newark, New Jersey plant.

The order to bargain was based on an earlier determination by the Board (not officially reported; JA 21) that the technical employees in the Thermo-Electric Division constituted an appropriate bargaining unit. In reaching this conclusion the Board had reversed the determination of its Regional Director that a unit of the technical and professional employees was appropriate (JA 8), while nevertheless accepting the Regional Director's findings of fact (JA 22). In bringing the Board's order here for re-

* In this petition, "JA" refers to the Joint Appendix and "CR" to the Certified List of the material comprising the record.

view, the Employer sought judicial review of the Board's earlier unit determination, attacking the conclusion that the appropriate bargaining unit consisted of technical employees on two basic grounds: (1) the Board's decision showed that its unit determination had been controlled by the IUE's "extent of organization", in violation of 9(c)(5) of the National Labor Relations Act (the "Act"); and (2) the Board acted arbitrarily in holding that a unit of technical employees was appropriate in this case on the stated ground that the IUE rather than the Employer had filed the petition for the election.

By an opinion order dated June 3, 1963, this Court denied the petition for review and granted the Board's cross-petition for enforcement.

In its opinion, this Court found:

(a) that the Board's unit determination was not controlled by "extent of organization" but was based on other and proper "implied" grounds (Opinion, p. 6):

> "None of the parties in the case have questioned the correctness of the Regional Director's findings of the basic historical facts, nor indeed could they, for the evidence conclusively supports them. The Board's opinion, which is principally directed towards answering the employer's contentions, clearly though impliedly adopts these findings and bases its decision thereon. The Board's decision, which rejects the Director's choice of the larger unit for policy reasons not considered by the Director, is amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision that a unit of the technicals alone would be an appropriate unit.";

and (b) that the unit determination was not arbitrary (Opinion, pp. 6-7).

The grounds of the petition for rehearing are:

(a) The Board did not make, and could not have made, its unit determination on the "implied" grounds which the Court now finds to have been the basis for that determination, and which the Court now holds to have justified that determination.

(b) The Court's opinion was not addressed to, and did not pass upon, the specific claim of arbitrariness raised by the Employer's petition for review: that the Board was arbitrary in holding that, because the IUE filed the petition for an election, a unit confined to technical employees was appropriate in this case, while a unit of technical and professional employees would have been appropriate if the Employer had filed the petition.

The Court sustained the Board's decision on grounds the Board did not and could not adopt.

The Court's opinion (p. 5) confirms that if the Board applied inappropriate standards in reaching its unit determination, its order could not be enforced. We may then divide the issue into two parts: *First*, what standards did the Board apply? *Second*, were those standards proper? Our difficulty with the Court's decision is with the first part of the issue, not the second. For the Court found the Board to have acted properly only by assigning to the Board's actions an "implied" basis which the Board did not make and could not have made part of its decision.

As we noted in our earlier briefs, what the Board *said* as to its grounds of decision was no more than this (JA 22):

Appendix A

Petition for Rehearing

> "It is clear that the Petitioner seeks to represent only the technical employees and does not desire to represent the professionals. Moreover, where as here, the Petitioner has no showing of interest among the professional employees, the Board will not direct an election among them to ascertain whether they wish to be joined in the same unit with non-professionals. In these circumstances, we find that the requested unit limited to the technical employees is appropriate".

We argued that what the Board *said* were its reasons added up to "extent of organization", and nothing more, and thus violated §9(c)(5) of the Act.

The Court, however, seems to hold that, despite the language of the Board's decision, the Board used *other* grounds, which though not *expressed* in the Board's decision, were nevertheless "impliedly" there, and that the reasons which the Board "impliedly" though silently adopted, supported its unit determination (p. 6). In effect, we are told: While the reasons the Board *announced* do not support its unit determination, the Board in fact based its decision on reasons which the Board did *not* announce, and those unannounced reasons *do* support its determination.

We may concede the possibility that, in theory, the Board may decide a case on "implied" grounds different than those it announces. Whether or not such "implied" grounds may support a determination which is improper in terms of the grounds which have been made *explicit*, is, however, another matter. *See Colorado-Wyoming Gas Company* v. *Federal Power Commission*, 324 U. S. 626, 634-35 (1945); *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-89 (1942). But the essential point here is that the Board, in *this* case, *did* not and *could* not have "im-

plied]y" adopted the particular grounds which this Court has said provided the basis for decision. This is apparent, we think, from the posture of the case before the Board.

The Regional Director had made findings of fact on the basis of which *he* concluded that the appropriate unit consisted of technical *and* professional employees (JA 15). Accordingly, he directed an election in *that* unit, dividing it into two voting groups, professionals and technicals, for the single and stated reason that (JA 15):

> "Section 9(b)(1) of the Act precludes the Board from including professional employees and non-professional employees in a single bargaining unit without according the former an opportunity of separately expressing their desires respecting such inclusion".

The Regional Director, thus, found that the facts were such that a unit of technicals would be appropriate only *if* the professionals, in their statutory election which he had no power but to direct, chose *not* to be included in the larger unit that he found those facts made appropriate. The whole issue before the Board, then, was whether the technicals and professionals together made up an appropriate unit from which the professionals were to have their statutory right to exclude themselves.* The Board held that the technical unit was appropriate *without* affording to the professionals their statutory right to elect to be included or excluded, although the Regional Director had found that the pre-condition of a unit confined to the technicals was the very election of the professionals to

* The ground of the IUE's petition to the Board for review of the Regional Director's decision was not that the combined unit was inappropriate (the IUE said it did not dispute the Director's finding to the precise contrary), but only that the technicals should have the same right to be excluded from an overall unit as the professionals (CR 5, pp. 2-3; JA 22).

exclude themselves. The *Regional Director's* findings, to which no exception was taken either by the IUE or the Board, and his conclusion based on those findings that a technical unit would be appropriate if the professionals elected to be *excluded*, cannot, in logic, be said to support the *Board's* determination that the technical unit is appropriate when the professionals are given no election at all. And the Court's supposition that the Board "impliedly" rested its decision *on the Regional Director's* "findings" and "reasons" (which brought the Director to a contrary result and could not support the Board's conclusion in this respect) is the only route by which the Court escapes the conclusion that the Board decided the case on "extent of organization".

That the Board did *not* rest its decision on the grounds now supposed by the Court is clear, moreover, not only from the fact that those grounds were not, in logic, available to the Board, but from what the Board itself said of the Regional Director's determination in its decision (JA 22):

> "The Regional Director, in accord with the Employer's contention, found that a unit including both technical and professional employees was appropriate."

While thus reporting that the Regional Director found the combined unit appropriate, the Board *omits* to state that the Regional Director also found that a unit confined to technicals would be appropriate only *if* the professionals chose to be excluded. Clearly, there was no basis for the Court's finding that the Board, in reversing the Regional Director on the principal question as to which his conclusion was stated, *relied* upon his unstated conclusions on a different question.

Appendix A

Petition for Rehearing

In truth, the record as a whole is clear that the Board's decision was *not* based on the Regional Director's findings, and the Board has never, on any of the four available occasions, claimed that it was. Thus:

(a) In the decision itself (JA 21), the Board said only that (JA 22):

> "It is clear that the Petitioner seeks to represent only the technical employees and does not desire to represent the professionals. Moreover, where as here, the Petitioner has no showing of interest among the professional employees, the Board will not direct an election among them to ascertain whether they wish to be joined in the same unit with non-professionals. In these circumstances, we find that the requested unit limited to the technical employees is appropriate".

This is the explanation which the Court says "clearly" adopts the "reasons" and "findings" for the Regional Director's alternative decision as to the appropriateness of the technicals. But the explanation does not even mention that the Regional Director made an alternative decision, let alone its given "reasons" and "findings". Is not the only clear thing about this explanation the Board's exclusive reliance on the IUE's failure to show interest among the professionals (which the Director had found was *not* reason to exclude them from the unit—JA 17 n. 7) as reason for excluding them?

(b) In its order denying the Employer's motion for reconsideration (JA 28), the Board—this time and for the first time faced with the Employer's contention that (JA 28):

> "the Board improperly rejected the Regional Director's determination that an over-all unit joining the

technical and professional employees was appropriate and thereby permitted the [IUE], through its showing of interest, to determine the appropriateness of the unit"—

made no mention whatsoever of whatever other standards, if any, it did use in fixing a unit of technicals.

(c) In its decision finding the Employer guilty of an unlawful refusal to bargain (JA 56), the Board summarized its earlier decision as follows (JA 59):

> "On March 27, 1962, the Board issued its Decision on Review, Order and Direction, in which it modified the unit found appropriate by the Regional Director, and found [the technicals] to be an appropriate unit."

Is the Board "clearly" relying on the Regional Director's reasons for his alternative decision?

(d) In his brief to this Court, the Board's General Counsel summarized that same decision as follows (pp. 4-5):

> "On March 27, 1962, the Board modified the unit found by the Regional Director. It found a unit of the employer's technical employees, but excluding its professional employees, to be appropriate. * * * In reaching this conclusion, the Board noted that the [IUE] was seeking to represent only the technical employees and did not desire to represent the professionals * * *. In addition, it noted that there was no showing of interest in representation by the [IUE] among the professional employees".

Again, no claim that the decision was based on the Director's reasons for his alternative decision, or even a mention of that decision, or its reasons.

Appendix A

Petition for Rehearing

We submit that where the Board itself claimed on none of four available occasions that its decision was based on the Regional Director's "findings" and "reasons" for his alternative decision, the Court may not say that the Board "clearly though impliedly" adopted those "findings" and "reasons", and based its decision thereon. In any event, the "findings" and "reasons" of the Regional Director (whose determination was reversed by the Board) could not support the Board's decision.*

In our view, the Board ever so obviously based its decision on extent of organization. By contrast, there is the Board's decision in *Quaker City Life Insurance Company*, 134 NLRB 960 (1961), in which the Board, in finding an extent-of-organization unit appropriate, not only said that it was applying "our normal unit principles" (*id.*, at 962), but listed the "normal unit principles" governing the facts of the case as well (*ibid.*). This Court could thus uphold that unit determination because "normal rules were applied to determine whether the [extent-of-organization] unit was appropriate." *NLRB* v. *Quaker City Life Insurance Company*, —— F. 2d —— (C. A. 4th, June 3, 1963), at p. 6. If the Court had held the Board in *this* case to the standards it found the Board had met in *Quaker City*, the Board's decision would not have been enforced.

* The Court found, on the basis of its own review of the record, that "sufficient distinctions between the technicals and the professionals exist to support a separation" (p. 5). That is a finding that the Board did not make; nor could it have "clearly" adopted it from the Regional Director, since he did not make it either. It is, anyway, beside the point, since the question before the Court was not whether the record would support such a finding, but whether the Board, in the Court's language (p. 5), "applied inappropriate standards in reaching the result."

Appendix A

Petition for Rehearing

The Court failed to pass upon the Employer's specific claim of arbitrariness.

The Court's opinion does not deal with the specific reason why, we argued in our briefs, the Board's decision was arbitrarily inconsistent with *Reynolds Electrical & Engineering Company, Inc.*, 133 NLRB 113 (1961), in which, on the basis of a finding that a division's technical and professional employees "constitute a homogeneous, clearly identifiable group with distinctive work interests" (*id.*, at 114), the Board found appropriate a combined unit of professionals and technicals. The Court said (p. 7):

> "*Reynolds* is factually distinguishable. In *Reynolds* the employer filed the petition. The Board does not require a showing of interest among the professional employees when the employer files the petition, although it does when the union files the petition. *This is not an arbitrary rule.*" (Emphasis added.)

But we had not argued it was an arbitrary rule. We had made explicit in our main brief (pp. 30-31), in fact, that:

> "We do not here challenge the Board's right administratively to require a 'showing of interest' when a union files a representation petition."

We had argued instead that since the Board jealously insists on treating showings of interest as "administrative expedients only, adopted to enable the Board to determine for itself whether or not further proceedings are warranted", *O. D. Jennings & Company*, 68 NLRB 516, 518 (1946), it may not allow showing of interest to affect its exercise of its statutory duty to "decide in each case" what the appropriate unit shall be, §9(b) of Act, but that, in the case at bar, it *had* allowed showing of interest to affect its

unit determination, as its stated ground for refusing to follow *Reynolds* (the same ground used by the Court) proved (JA 33 n. 3).

For the Court, thus, to say that it is not arbitrary for the Board to require a showing of interest in union petition cases but not in employer petition cases, is to miss the point that it *is* arbitrary for the Board to perform its statutory duty to decide appropriate units in one way in an employer petition case and to refuse to perform that duty in the same way in a union petition case.

The Board would have found the unit of technicals and professionals appropriate if the IUE had shown interest among the professionals—that has never been gainsaid. The IUE did not show interest among the professionals, and, for that alone, the Board refused to find that unit appropriate. The Board failed to follow *Reynolds* on the basis of a pure "administrative expedient" which may have nothing to do with unit appropriateness. *That* is arbitrary.

Conclusion

The Court should grant the Employer's Petition for Rehearing.

Dated: New York, N. Y.
July 3, 1963

Respectfully submitted,

POLETTI FREIDIN PRASHKER & HARNETT,
Attorneys for Petitioner.

Of Counsel:
JESSE FREIDIN
HERBERT PRASHKER
ERIC ROSENFELD

Appendix A

Decree of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[SAME TITLE]

THIS CAUSE came on to be heard upon the petition of the General Instrument Corporation for a review of the order and decision of the National Labor Relations Board of December 10, 1962, issued against said General Instrument Corporation, Newark, New Jersey, its officers, agents, successors, and assigns, in a proceeding before said Board, known upon its records as case No. 22 CA 1292; upon the answer of said Board and cross-petition for enforcement; upon the answer of the General Instrument Corporation to the cross-petition for enforcement, and upon the certified list in lieu of a transcript of the record; and said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order of the said Board issued December 10, 1962, be, and the same is hereby, enforced, and that the said General Instrument Corporation, its officers, agents, successors, and assigns, abide by and

perform the directions of the Board in said order contained.

June 3, 1963.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

J. SPENCER BELL
United States Circuit Judge.

Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[SAME TITLE]

(Argued April 4, 1963.) (Decided June 3, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and J. SPENCER BELL Circuit Judges.

Jesse Freidin (Herbert Prashker, Eric Rosenfeld, and Poletti, Freidin, Prashker & Harnett on brief) for Petitioner; Warren M. Davison, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel; Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and William J. Avrutis, Attorney, National Labor Relations Board, on brief) for Respondent, and Donald Grody (Abramson & Lewis on brief) for International Union of Electrical, Radio and Machine Workers, AFL-CIO, *Amicus Curiae*.

J. SPENCER BELL, Circuit Judge:

Pursuant to National Labor Relations Act 10(f), 29 U. S. C. A. 160(f), General Instrument Corporation, the employer, brings action in this Court seeking to set aside a decision and order of the National Labor Relations Board. The Board cross-petitions pursuant to National Labor Relations Act 10(e), 29 U. S. C. A. 160(e), for enforcement of the order. The union involved is the International Union of Electrical, Radio and Machine Workers, AFL-CIO. The order involved requires the employer to

bargain collectively with the union as certified representative of the employees, to cease and desist from violating National Labor Relations Act §8(a)(1) and (5), 29 U. S. C. A. 158(a)(1) and (5), and to post appropriate notices.

General Instrument Corporation has several plants, including four within the area encompassed by this Circuit. Involved in this petition is the employer's Thermo-Electric Division at its Newark, New Jersey, plant. The Thermo-Electric Division is devoted to research and development and at the time of the Regional Director's hearing, contained 32 employees, 17 of whom were classified as engineers and 15 of whom were in laboratory classifications. The evidence indicates that the laboratory and the engineering employees work very closely with each other, frequently performing overlapping functions. However, the evidence also indicates that there are several areas in which the groups do not share common interests. The engineers are professionals, whereas the laboratory workers are not; the engineers are generally paid on a salary basis ranging up to $300.00 per week, whereas the laboratory technicians are paid on an hourly basis with rates running up to $3.10 per hour; in general, the engineers are not paid for overtime hours, whereas the laboratory technicians are so paid; most of the engineers have college degrees or the equivalent, or are in the process of obtaining one, whereas none of the laboratory workers have this qualification.

After a hearing, the Regional Director found that a unit of all professional and technical employees would be appropriate, but if the professional employees were to vote under National Labor Relations Act §9(b)(1), 29 U. S. C. A. §159(b)(1), against inclusion, a unit of laboratory technicians would be appropriate. The Board, reversing the Regional Director, found a unit of laboratory technicians to be appropriate and, therefore, limited the voting

count to the ballots cast by these employees. On this basis, a majority of the employees in the unit voted for unionization.

In its analysis of the issues, the Board stated that:

> "it is clear that the Petitioner [the union] seeks to represent only the technical employees and does not desire to represent the professionals. Moreover, where as here, the petitioner has no showing of interest among the professional employees, the Board will not direct an election among them to ascertain whether they wish to be joined in the same unit with the non-professionals [citing cases in a footnote]. In these circumstances, we find that the requested unit limited to the technical employees is appropriate . . . ."

The employer filed a motion before the Board for reconsideration of the decision, asserting that the Board had allowed the union, by its showing of interest, to determine the appropriateness of the unit. In denying this motion, the Board stated that it

> "is of the opinion that the Employer's motion to reconsider should be denied as lacking in merit because the unit of technical employees in the Employer's Thermo-Electric Division, excluding the professional employees, is appropriate for the purposes of collective bargaining."

The employer contends that the decision of the Board should be set aside, since 1) the Board violated N. L. R. A. §9(c)(5), 29 U. S. C. A. §159(c)(5), in that it gave controlling effect to the extent of organization of the employees, 2) the Board failed to perform its duty as imposed by N. L. R. A. §9(b), 29 U. S. C. A. §159(b), to "decide in each case" what the appropriate unit should

be, and 3) the Board's unit determination is arbitrary, capricious and an abuse of discretion in violation of Administrative Procedure Act §10(e)(B)(1), 5 U. S. C. A. §1009(e)(B)(1).

Primary responsibility for deciding whether a unit is appropriate for purposes of collective bargaining has been granted to the National Labor Relations Board. N. L. R. A. §9(b), 29 U. S. C. A. §159(b). Our scope of review of this decision is very limited. *N. L. R. B.* v. *Quaker City Life Insurance Co.*, —— F. 2d —— (4th Cir. 1963). Misapplication of law, failure of substantial evidence, abuse of discretion—these are the elements upon which a court may rely in reviewing the Board's decision. National Labor Relations Act §10(e) & (f), 29 U. S. C. A. §160(e) & (f); Administrative Procedures Act §10(e), 5 U. S. C. A. §1009(e); *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947); *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485 (1947); *Pittsburg Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146 (1941); *N. L. R. B.* v. *Quaker City Life Insurance Co.*, *supra*. Absent these, the administrative determination must be supported.

A sufficient basis in substantial evidence on the record as a whole exists to sustain the order presently under attack. The technicals are sufficiently cohesive as a unit and at the same time sufficiently distinct from the professional engineers to permit separate bargaining units. Working conditions, hourly wage scales, job specifications, and advancement opportunities indicate that the technicals have a strong common bond; different levels of education, job specifications, wage basis, advancement opportunities and, significantly, professional status, support a finding that sufficient distinctions between the technicals and the professionals exist to support a separation.

This is not to say that a different result would have been incorrect. A unit combining technicals and professionals might also have been proper. However, where, as

often occurs, more than one unit might properly be found appropriate, the Board has the responsibility of making the determination. *N. L. R. B.* v. *Quaker City Life Insurance Co., supra.*

The employer bases its main attack on a claim that the Board, although it may have come to a conclusion that is supportable on the record, applied inappropriate standards in reaching the result. Were this the case, the Board's decision could not be enforced. *N. L. R. B.* v. *Quaker City Life Insurance Co., supra; N. L. R. B.* v. *Glen Raven Knitting Mills, Inc.*, 235 F. 2d 413 (4 Cir. 1956).

In reversing the decision of the Regional Director, the Board indicated that it was giving consideration to the union's unwillingness to represent the professionals and to the fact that there was no "showing of interest" among the professionals for representation by the union. It is claimed that in so doing the Board violated §9(c)(5) of the Act, 29 U. S. C. A. §159(c)(5), by giving controlling effect to the extent to which the employees had organized. If it were true that these reasons were the sole basis for the Board's decision, a serious question as to the validity of the Board's order would result. *N. L. R. B.* v. *Glen Raven Knitting Mills, Inc., supra; N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 422-423 (1947); *Allis-Chalmers Mfg. Co.* v. *N. L. R. B.*, 162 F. 2d 435, 439 (7 Cir. 1947). We think the record indicates that the Board did apply proper reasons in deciding the issue. The courts have often held that although the extent of organization may not be controlling, it may be a factor; e.g., *N. L. R. B.* v. *Quaker City Life Insurance Co.*, —— F. 2d —— (4 Cir. 1963), and cases therein cited.

None of the parties in the case have questioned the correctness of the Regional Director's findings of the basic historical facts, nor indeed could they, for the evidence conclusively supports them. The Board's opinion, which is principally directed towards answering the em-

ployer's contentions, clearly though impliedly adopts these findings and bases its decision thereon. The Board's decision, which rejects the Director's choice of the larger unit for policy reasons not considered by the Director, is amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision that a unit of the technicals alone would be an appropriate unit.

The employer contends that the Board's decision was arbitrarily inconsistent with the decision of the Board in *Reynolds' Electrical & Engineering Company, Inc.*, 133 N. L. R. B. 113, 48 L. R. R. M. 1603 (1961). However, *Reynolds* is factually distinguishable. In *Reynolds* the employer filed the petition. The Board does not require a showing of interest among the professional employees when the employer files the petition, although it does when the union files the petition. This is not an arbitrary rule as was the one attacked in *N. L. R. B. v. Pittsburg Plate Glass Co.*, 270 F. 2d 167 (4 Cir. 1959), *Cert. denied*, 361 U. S. 943 (1960). When a union files a petition limited to a certain group, presumably either the union lacks interest in those excluded, or the extent of organization has not extended far enough to include them. Since these may be factors (although not controlling), and since professional employees generally have interests separate from other employees, it is reasonable for the Board to require a showing of interest among the professionals when it is contended that they be included in the unit. This does not necessarily follow when the employer files the petition. His reasons for excluding or including these employees may be quite different.

As a substantial amount of evidence in the record as a whole exists to support the Board's conclusion, and appropriate legal standards were used, the order of the Board should not be set aside.

Enforced.

Board's Decision and Order to Bargain

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TWENTY-SECOND REGION

Case No. 22-CA-1292

General Instrument Corporation

and

Local 472, International Union of Electrical, Radio and Machine Workers, AFL-CIO

Upon a charge and first amended charge filed by Local 472, International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called Local 472, the General Counsel of the National Labor Relations Board by the Regional Director of the Twenty-second Region issued a complaint dated August 3, 1962, against General Instrument Corporation, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, amended charge, complaint and notice of hearing were duly served upon Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about April 12, 1962, the Regional Director of the Twenty-second Region issued a certification in Case No. 22-RC-1353 designating International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called the IUE, as the exclusive collective bargaining representative of a unit composed of all technical employees in the Thermo-Electric Division of the

Appendix A

Board's Decision and Order to Bargain

Respondent's plant in Newark, New Jersey. The complaint also alleges that on or about April 13, 1962, and at all times thereafter, Respondent unlawfully refused to bargain with the IUE or its designated agent, Local 472.

On September 17, 18, and 19, all parties to this proceeding entered into a stipulation and jointly moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and decision and order. The motion states that the parties waive hearing and oral argument before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, the issuance of an Intermediate Report and Recommended Order, and oral argument before the Board. The motion also provides that the parties' stipulation and certain specified documents constitute the entire record in the case.

On September 25, 1962, the Board granted the parties' motion to transfer the case to the Board. Briefs were thereafter filed by the General Counsel, the Charging Party, and the Respondent.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the basis of the parties' stipulation, the briefs,[1] and the entire record in the case, the Board makes the following:

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1. In its brief to the Board, Local 472 incorporated a Motion to Strike certain portions of the stipulated record on the ground that these matters are "immaterial and superfluous." Oppositions to this motion have been filed by the General Counsel and by the Respondent. All parties, including Local 472, had stipulated that these matters "be deemed admitted in evidence and made a part of the record of this proceeding." The motion is denied.

Appendix A

Board's Decision and Order to Bargain

FINDINGS OF FACT

I. *The Business of the Respondent*

The Respondent maintains its principal office and place of business at its plant in Newark, New Jersey, and at all times material herein has been engaged at said plant and place of business in the manufacture, sale, and distribution of electronic devices and related products.

During the year immediately preceding the issuance of the complaint, the Respondent had sales in excess of $500,000, of which products, goods and materials valued in excess of $50,000 were shipped from said plant in interstate commerce directly to states of the United States other than the State of New Jersey.

The Respondent admits, and we find, that it is engaged in commerce within the meaning of the Act.

II. *The Labor Organizations Involved*

Local 472 and the IUE are labor organizations as defined in Section 2(5) of the Act.

III. *The Alleged Unfair Labor Practices*

On September 11, 1961, the IUE filed a petition in Case No. 22-RC-1353 seeking to represent a unit of technical employees in the Employer's Thermo-Electric Division, Newark, New Jersey. Following a hearing, the Regional Director for the Twenty-second Region issued a Decision and Direction of Elections on November 13, 1961, in which he found, in agreement with the contention of the Respondent, that a unit including both technical and professional employees was appropriate. Accordingly, he directed separate elections in two voting groups, one consisting of

Appendix A

Board's Decision and Order to Bargain

all professional employees and the other consisting of all technical employees.

Subsequent to this Decision the IUE filed with the Board a timely Request for Review of the Regional Director's Decision and Direction of Elections. Opposition to this Request was filed by Respondent. The Board by telegraphic orders, dated December 7, 1961, and December 12, 1961, respectively, ordered the Regional Director to proceed with the elections as scheduled, but to impound the ballots, and granted the Request for Review, directing that the ballots cast in the elections remain impounded pending its decision on review.[2] On March 27, 1962, the Board issued its Decision on Review, Order and Direction, in which it modified the unit found appropriate by the Regional Director, and found the following unit of Respondent's employees to be an appropriate unit within the meaning of Section 9(b) of the Act:[3] "All technical employees in the Thermo-Electric Division of the Employer's plant in Newark, New Jersey, including senior laboratory technicians, laboratory technicians, laboratory specialists, junior laboratory technicians, and laboratory apprentices, but excluding professional employees, all other employees, watchmen, guards, and supervisors as defined in the Act."

Thereafter, on April 3, 1962, the ballots of the employees in the unit found appropriate by the Board were counted and a Tally of Ballots was furnished the parties which showed that of 15 valid votes cast in the election, 8 were cast for the IUE and 7 were cast for "no-union." One other ballot was challenged because the voter's name was not on the eligibility list. On April 12, 1962, the Regional

2. The elections were held on or about December 8, 1961.

3. On April 11, 1962, Respondent filed a motion for reconsideration of the Board's Decision on Review, Order and Direction. This motion was denied by the Board on May 7, 1962.

Appendix A

Board's Decision and Order to Bargain

Director issued a Supplemental Decision and Certification of Representatives wherein he sustained the challenge to the ballot and certified the IUE as the exclusive representative of the employees in the above-described unit.[4]

On April 13, 1962, the IUE designated Local 472 as its agent for the purpose of engaging in collective bargaining with Respondent with respect to the certified unit. On the same date, Harry Kelner, International Representative of the IUE and the Business Representative of Local 472, formally requested the Respondent to meet and bargain. The Respondent refused. On May 8, 1962, Respondent sent a telegram to the IUE stating that it refused to bargain with the IUE for the unit certified by the Board on the ground that the Board's unit determination violated the Act. Thereafter, by letter dated May 10, 1962, addressed to its employees, the Respondent stated that it had advised the IUE to file a "refusal to bargain" charge with the Board in order that Respondent might obtain review of the Board's action in a Federal Court. Respondent admits that on or about April 13, 1962, and at all times thereafter it has refused and continues to refuse to recognize or bargain with the IUE or its agents.

The Respondent's defense is concerned solely with the Board's unit determination, and Respondent has raised no matter not previously considered and rejected by the Board in the aforementioned representation proceeding. We accordingly find that the Respondent, by refusing to bargain with the IUE on and after April 13, 1962, has violated Section 8(a) (5) and (1) of the Act.

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4 The challenge to the ballot was sustained because the Regional Director found that the voter in question had been discharged for cause prior to the payroll period used to determine voter eligibility. This fact was conceded by the IUE in the course of the investigation of the challenged ballot.

Appendix A

Board's Decision and Order to Bargain

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of the Respondent, set forth in Section III above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the IUE as the exclusive representative of its employees in the appropriate unit.

VI. *Conclusions of Law*

1. General Instrument Corporation is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All technical employees in the Thermo-Electric Division of the Respondent's plant, Newark, New Jersey, including senior laboratory technicians, laboratory techni-

cians, laboratory specialist, junior laboratory technicians and laboratory apprentices, but excluding professional employees, all other employees, watchmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since April 12, 1962, the IUE has been and continues to be the exclusive bargaining representative of all the employees in the aforementioned unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, on and after April 13, 1962, to bargain collectively with the IUE as the exclusive representative of its employees in the aforesaid unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing to bargain with the IUE, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, General Instrument Corporation, Newark, New Jersey, its officers, agents, successors, and assigns, shall:

Appendix A

Board's Decision and Order to Bargain

I. Cease and desist from:

(a) Refusing to bargain with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the representative of its employees in the above-described appropriate unit.

(b) In any like or related manner interfering with the efforts of the above-named labor organization to bargain collectively.

II. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the representative of its employees in the above-described appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Newark, New Jersey, copies of the notice attached hereto marked "Appendix."[6] Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

6: In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Appendix A

Board's Decision and Order to Bargain

(e) Notify the Regional Director for the Twenty-second Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. December 10, 1962.

Frank W. McCulloch, Chairman
Boyd Leedom, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix A

Board's Order Denying Reconsideration

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 22-RC-1353

General Instrument Corporation,

Employer,

and

International Union of Electrical, Radio and Machine Workers, AFL-CIO,

Petitioner.

On March 27, 1962, the Board issued a Decision on Review, Order and Direction[1] in the above-entitled proceeding in which it found appropriate a unit of all technical employees in the Thermo-Electric Division of the Employer's plant in Newark, New Jersey, vacated the election previously held in a voting group of professional employees, and directed the Regional Director to open and count the impounded ballots of the technical employees in the unit found appropriate and serve upon the parties a tally of ballots and take such further steps as might be necessary in accordance with the Board's Rules and Regulations. Thereafter the Employer filed a motion for reconsideration of the Board's Decision, asserting that the Board improperly rejected the Regional Director's determination that an over-all unit joining the technical and the professional employees was appropriate and thereby permitted

1. Not published in NLRB volumes.

Appendix A

Board's Order Denying Reconsideration

the Petitioner, through its showing of interest, to determine the appropriateness of the unit. On April 12, 1962, the Petitioner filed a telegraphic opposition to the motion.

The Board having duly considered the matter, is of the opinion that the Employer's motion to reconsider should be denied as lacking in merit because the unit of technical employees in the Employer's Thermo-Electric Division, excluding the professional employees, is appropriate for the purposes of collective bargaining.

The Board is of the further opinion that the Employer's allegation, in support of its motion and for the first time advanced therein, that there might be some technical employees excluded from the unit found appropriate, is untimely. Accordingly,

IT IS HEREBY ORDERED that the Employer's motion for reconsideration be, and it hereby is, denied.

Dated, Washington, D. C. May 7, 1962.

By direction of the Board:

HOWARD W. KLEEB
Associate Executive Secretary

Appendix A

Board's Decision on Review, Order and Direction

[SAME TITLE AS CASE NO. 22-RC-1353]

On November 13, 1961, the Regional Director for the Twenty-second Region issued a Decision and Direction of Elections in the above-entitled proceeding, finding that an over-all group of technical and professional employees in the Employer's Thermo-Electric Division may constitute an appropriate unit and, because of the provisions of Section 9(b)(1) of the National Labor Relations Act, directed self-determination elections for the employees in each of the two separate categories involved. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, the Petitioner filed with the Board a timely Request for Review of such Decision and Direction of Elections on the ground that a substantial question of law or policy was raised because of a departure from Board precedent. The Employer filed an opposition. The Board, by telegraphic Orders, dated December 7, 1961, and December 12, 1961, respectively, ordered the Regional Director to proceed with the elections as scheduled but to impound the ballots, and granted the Request for Review, directing that the ballots cast in the elections remain impounded pending its decision on review. Thereafter, the Employer filed a brief, and the National Society of Professional Engineers, herein called the Engineers, filed a brief *amicus curiae*.

The Board[1] has considered the entire record in this case with respect to the Regional Director's determination under review, together with the briefs filed herein, and makes the following findings:

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1. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Appendix A

Board's Decision on Review, Order and Direction

The Petitioner seeks to represent a unit limited to the technical employees in the Employer's Thermo-Electric Division. The Regional Director, in accord with the Employer's contention, found that a unit including both technical and professional employees was appropriate. In its Request for Review, the Petitioner contends that the Regional Director, by grouping the technical and professional employees together, deprived the technical employees of their right to exercise the freedom of choice guaranteed to them by the Act. The Engineers asserts in its brief that in the circumstances of this case no election should be directed among the professional employees. There is no dispute as to the Regional Director's findings.

It is clear that the Petitioner seeks to represent only the technical employees and does not desire to represent the professionals. Moreover, where, as here, the Petitioner has no showing of interest among the professional employees, the Board will not direct an election among them to ascertain whether they wish to be joined in the same unit with non-professionals.[2] In these circumstances, we find that the requested unit limited to the technical employees is appropriate and we shall vacate the election held in the voting group of professional employees and direct the Regional Director to open and count the impounded ballots cast in the technical employees voting group.

Accordingly, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3]

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2. *Tele-Dynamics Division, American Bosch Arma Corp.*, 132 NLRB No. 61; *Difco Laboratories, Inc.*, 129 NLRB 887; *Vickers Incorporated, supra*, at 1054.

3. *Reynolds Electrical & Engineering Company, Inc.*, 133 NLRB No. 28, is distinguishable on its facts. In *Reynolds*, the Employer-Petitioner sought a departmental unit which included both professional and technical employees, and no showing of interest was required.

Appendix A

Board's Decision on Review, Order and Direction

All technical employees in the Thermo-Electric Division of the Employer's plant in Newark, New Jersey, including senior laboratory technicians, laboratory technicians, laboratory specialists, junior laboratory technicians, and laboratory apprentices, but excluding professional employees, all other employees, watchmen, guards, and supervisors as defined in the Act.

ORDER

IT IS HEREBY ORDERED that the election held in the voting group of professional employees be, and it hereby is, vacated.

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for the Twenty-second Region shall, pursuant to the Rules and Regulations of the Board, within ten (10) days from the date of this Direction, open and count the impounded ballots of the technical employees included in the unit found appropriate herein and thereafter prepare and cause to be served upon the parties a tally of ballots, and take such further steps as may be necessary in accordance with the Board's Rules and Regulations.

Dated, Washington, D. C. March 27, 1962.

Frank W. McCulloch, Chairman
Boyd Leedom, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix A

Regional Director's Decision and Direction of Elections

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

[SAME TITLE]

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers herein to the undersigned Regional Director.

Upon the entire record, the undersigned Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations named below claim to represent certain employees of the Employer.[1]

1. Local Union No. 1104, International Brotherhood of Electrical Workers, AFL-CIO, herein called the Intervenor, was permitted to intervene herein upon the basis of its contract covering a unit of production and maintenance employees at the Employer's Newark, New Jersey plant. The Intervenor thereafter withdrew its contention that this contract is a bar to the instant proceeding and indicated that it did not wish to be on the ballot in any election directed in either the unit sought by Petitioner or in that contended to be appropriate by the Employer.

Appendix A

Regional Director's Decision and Direction of Elections

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent the laboratory specialists, laboratory technicians and apprentices engaged in experimental and development work in the Employer's Thermo-Electric Division at its plant located at 65 Gouvenour Street, Newark, New Jersey, excluding all employees in the unit covered by the contract of March 21, 1960, between the Employer and the Intervenor, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act. The Employer contends that the appropriate unit should include, in addition to the requested classifications, a group of employees in this division classified as senior engineers, engineers and junior engineers.

The Employer is engaged in the production of certain electronic devices, and in research and development in the electronics area at its Newark plant. The Employer's plant is divided into three divisions, i.e., the Automatic Manufacturing Division, the Semi-Conductor Division and the Thermo-Electric Division. The Petitioner and the Intervenor each represent various units of the Employer's employees in the Automatic Manufacturing Division and in the Semi-Conductor Division. There is no bargaining history for the employees in the Thermo-Electric Division.

The Employer's Thermo-Electric Division's primary functions are to prepare technical proposals and to produce technical reports. This division currently has seven government contracts relating to different projects concerned with various studies of nuclear phenomena and devices. All employees assigned to this division have either engineering or laboratory job classifications, discussed in more de-

tail *infra*. The parties agree that all employees in the engineering classifications are professional employees and that all employees in the laboratory classification are, or will eventually become, technical employees.[2] Petitioner contends that the technical employees constitute an appropriate bargaining unit, while the Employer takes the position that a unit coextensive with the Thermo-Electric Division and embracing both technical and professional employees is alone appropriate. At the time of the hearing, there were 17 employees in engineering classifications and 15 employees in laboratory classifications, and the teams or groups of employees assigned to specific projects include employees from each group.

The record reveals that there are six employees classified as senior engineers, five employees classified as engineers and five employees classified as junior engineers. These employees are all salaried, with senior engineers receiving from $180 to $300 per week, engineers receiving from $140 to $190 per week, and junior engineers receiving up to $150 per week.

Five of the six engineers classified as "senior engineers" are currently in charge of "projects" and are also called project engineers. Senior engineers are assigned to head up specific projects by Melvin Barmat, manager of the Thermo-Electric Division. Barmat may also assign additional employees to work with the project engineer on a project on his own initiative or at the request of the senior engineer for additional manpower. The project engineer renders technical direction on the project, has financial control of and makes the necessary purchases for the project, and keeps all necessary records connected with the project. He also assigns work to engineers and junior engineers

2. Two employees in this group are apprentices.

working with him on the project, but only Division Manager Barmat may reassign an employee from one project to another. Five of the senior engineers possess engineering degrees and the other, while possessing no degree, is an exceptional and experienced designer and developer of new ideas in the Thermo-Electric field, and was described by the Employer at the hearing as a genius. In Barmat's absence, the senior engineers, on a rotating basis, stand in his place as manager. In such cases, however, the senior engineer's power is limited to signing purchase and travel requisitions, and he does not have the authority to assign employees from one project to another project.

With respect to engineering employees classified as "engineers," one splits his time between the Thermo-Electric Division and the Semi-Conductor Division, with each Division paying one-half of his salary. The Employer testified that an engineer may be a project engineer, but this has never happened to date. Four of the engineers possess engineering degrees while the fifth, who was hired as an engineer, has had two years of college engineering courses and extensive experience in designing. The engineers' primary functions are to act as planners, testers and observers. Their work consists generally of computing electrical measurements, operating machine tools, performing metallurgical operations, preparing alloys and conducting tests and experiments. They also assign work to the laboratory technicians and the junior laboratory technicians.

Of the six junior engineers, two have engineering degrees, one has completed all of his college engineering requirements and two are presently taking engineering courses. One of the latter group was promoted to the classification of junior engineer from that of senior lab-

oratory technician. Junior engineers are less skilled than engineers. Two of the junior engineers are draftsmen who have graduated from high school and drafting school. The other four junior engineers perform work primarily in connection with structural analysis and heat transfer analysis, and often work closely with employees in laboratory classifications on a project. The junior engineers, like the "engineers" have a large amount of discretion in their work.

With respect to the laboratory employees who constitute the rest of the Thermo-Electric Division's employee complement, the record shows that there are five employees classified as "senior laboratory technicians," two employees classified as "junior laboratory technicians," two employees classified as "laboratory apprentices" and one employee classified as a "laboratory specialist." These employees are all hourly rated employees. The laboratory specialist receives $3.00 per hour, the senior laboratory technicians receive from $2.50 to $3.10 per hour, the laboratory technicians receive from $2.00 to $2.60 per hour, the junior laboratory technicians receive from $1.60 to $2.10 per hour and the laboratory apprentices receive from $1.40 to $1.70 per hour. None of these employees has a degree.

The senior laboratory technicians are primarily engaged in the planning and setting up of experiments and tests in conjunction with the engineers. In this connection, they assign work tasks to junior laboratory technicians and to laboratory apprentices, and prepare progress reports regarding job performance which are given to Barmat or to the senior engineer in charge of the project to which they are assigned.

The laboratory technicians are required to have some specialized training, and they also participate in the

planning and setting up of experiments. Most of their time is spent in the preparation of test specimen and in the actual conduct of the experiment under the guidance of an engineer. A laboratory technician will receive a sketch of an apparatus which the engineers desire to be built, will be informed of the object of the test for which the apparatus is to be used, and it is then his responsibility to build the apparatus and to aid in the actual testing of materials. Together with the senior laboratory technicians, laboratory technicians work closely with engineers and senior engineers in the planning and setting up of tests. If a test goes awry, the laboratory technicians and senior laboratory technicians must make complicated adjustments.

The "laboratory specialist" has a broad technical background, with many years of experience as a watchmaker and a machinist. He performs various tasks requiring a high degree of skill, and works closely with the engineers and draftsmen engineers with regard to the development of parts for thermo-electric generators. He also participates in the design of equipment, makes adjustments on test equipment, and performs difficult machining services and difficult assembly work and braising.

One junior laboratory technician is a woman who tests thermo-electric materials and performs calculations. If a measurement is improper, she can either adjust it or report it to the engineer or senior laboratory technician who assigned her the task. The other laboratory technician works in metallurgy. He prepares intra-metallic alloys which requires very accurate weighing and performs vacuum work and glass sealing work. He works under the guidance of an engineer and a laboratory technician or senior laboratory technician.

Appendix A

Regional Director's Decision and Direction of Elections

The "laboratory apprentices" assist senior laboratory technicians, laboratory technicians and engineers, and are required to have a high school education and a small amount of training to indicate that they have some mechanical or electrical skills. They work under the guidance of senior laboratory technicians and take measurements, work in heat transfer calorimetry, vacuum systems and laboratory scale electro-plating, and also participate in the conduct of tests. Only assignments which are considered routine are assigned to them.

The record revealed that all employees in the Thermo-Electric Division receive the same holidays, hospitalization and family death benefits. The hourly rated laboratory employees receive a $1000 life insurance policy, while those in the engineering classifications receive a life insurance policy based on their salaries which, in all cases, is higher than $1000. All of the employees punch time clocks except the project engineers. The laboratory employees receive overtime as do junior engineers earning less than $90 per week. All these employees work in the same general area, and all work in close collaboration as a team in the performance of their duties under the general supervision of Barmat. The record shows that employees in the engineering classifications perform every operation in the division and that the laboratory employees at times perform work normally considered to be engineering work, such as heat transfer analysis, computer quoting, calculations of a complex nature, drafting and designing work and buying of parts and equipment. It also appears that frequently, where more than one employee is required for an operation, an engineer and a technician work together jointly rather than two technicians or two engineers. It is also a common occurrence to have senior engineers, senior technicians

and laboratory technicians work side by side performing the same work.

The foregoing establishes that the employees in the Employer's Thermo-Electric Division constitute a homogeneous, clearly identifiable group with distinctive work interests, and I find that they may constitute an appropriate unit.[3] However, as Section 9(b)(1) of the Act precludes the Board from including professional employees and nonprofessional employees in a single bargaining unit, without according the former an opportunity of separately expressing their desires respecting such inclusion, the question remains as to whether or not any employees in the Thermo-Electric Division herein found appropriate are professional employees. As aforestated, both the Petitioner and the Employer agree that the senior engineers, engineers and junior engineers are professional employees. Further, the record shows that the employees in engineering classifications all perform duties which require the exercise of discretion and independent judgment with only limited guidance or direction. The difference in the classifications consists of a difference in the degree of skill, knowledge, education and training, and those within the classifications are assigned tasks which call for the application of their superior knowledge and experience. The record also reveals that, of the 17 employees in engineering classifications, 11 have graduate engineering degrees, one has completed all required college engineering courses, two are attending engineering classes matriculating toward a degree; one has had one or two years of engineering courses and one has had an extensive engineering background. Section 2(12) of the Act requires professionals to possess "knowledge of

3. *Reynolds Electrical & Engineering Company, Inc.*, 133 NLRB No. 28.

an advanced type". However, such knowledge need not come through academic training alone. It is settled Board policy that it is not the "individual qualifications of each engineer, but rather the character of the work required of them as a group," which is determinative of professional status.[4] The background of the individual is, of course, relevant and is examined for the purpose of deciding whether the work of the group satisfies the "knowledge of an advanced type" requirement. If it appears that a group of employees within a classification "is predominantly composed of individuals possessing a degree in the field to which the profession is devoted, it may be presumed that the work 'requires knowledge of an advanced type'."[5] Accordingly, in view of the foregoing and on the basis of the entire record, I find that all senior engineers, engineers and junior engineers are professional employees within the meaning of Section 2(12) of the Act.

None of the employees in the laboratory classifications possess engineering degrees. It follows that it logically requires that the education characteristics of the work are not those requiring the utilization of advanced knowledge.[6] Accordingly, even though several employees in the laboratory classifications possess a high degree of skill and are given a considerable measure of responsibility in their work with engineering employees, I find that they are not professional employees within the meaning of the Act. Rather, I find that the senior laboratory technicians, laboratory technicians, the laboratory specialist and junior laboratory technicians are technical employees, and that the laboratory

4. *Western Electric Company, Incorporated*, 126 NLRB 1346, footnote 5.

5. *Western Electric Company, Incorporated, supra*, at 1349; *The Ryan Aeronautical Co.*, 132 NLRB No. 125.

6. *Western Electric Company, Incorporated, supra*, at 1349.

apprentices exercise many technical skills and will in time progress to the status of technical employees.

As the Thermo-Electric Division unit herein found appropriate includes both professional and technical employees, I shall direct separate elections in the following voting groups at the Employer's Thermo-Electric Division at Newark, New Jersey, excluding all other employees, office clerical employees, watchmen, guards and supervisors as defined in the Act:[7] (1) all professional employees, including senior engineers, engineers and junior engineers; (2) all technical employees, including senior laboratory technicians, laboratory technicians, the laboratory specialists, junior laboratory technicians and laboratory apprentices.[8]

The professional employees in voting group (1) will be asked two questions on their ballot:

1. Do you desire to be included with the technical employees in a unit composed of all employees in the Employer's Thermo-Electric Division at its Newark, New Jersey plant?

2. Do you desire to be represented for the purposes of collective bargaining by International Union of Electrical, Radio and Machine Workers, AFL-CIO, or by no union?

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7. Petitioner argues that since there has been no showing of representation among the professional group, the Board should not conduct separate elections among the professionals, but, should instead exclude them from the unit. However, this same issue arose in *Reynolds Electrical & Engineering Company, Inc., supra,* where, notwithstanding a representative showing only within a technical group of employees, the Board ordered separate elections for the professional employees as well as the technical employees.

8. If the Petitioner is unwilling to represent professional employees in the same unit with technical employees, it may request withdrawal of its Petition within ten (10) days from the issuance of this Decision and Direction of Elections.

Appendix A

Regional Director's Decision and Direction of Elections

If a majority of the professional employees in voting group (a) vote "Yes" to the first question, indicating their wish to be included in a unit with the technical employees, they will be so included. Their votes on the second question will then be counted together with the votes of the technical group (b) employees in voting to decide whether the employees desire to be represented by International Union of Electrical, Radio and Machine Workers, AFL-CIO, in a unit of professional and technical employees of the Employer's Thermo-Electric Division. If, on the other hand, a majority of the professional employees in voting group (a) vote "No" to the first question, they will not be included with the technical employees in voting group (b).[9]

The foregoing unit determination respecting the Employer's Thermo-Electric Division employees is based in part, then, upon the results of the elections. However, I now make the following findings:

(A) If a majority of the professional employees[10] vote for inclusion in a unit with the technical employees, and a majority of the employees in groups (1) and (2) vote for representation by the Petitioner, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All professional employees and technical employees in the Employer's Thermo-Electric Division at its Newark, New Jersey plant, excluding all other employees, office clerical employees, watchmen, guards and supervisors as defined in the Act.

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9. *Reynolds Electrical & Engineering Company, Inc., supra.*

10. The parties stipulate that employees classified as senior engineers are not supervisors within the meaning of the Act. As the facts contained in the record support this stipulation, these employees are included in voting group (a). *Pennsylvania Power & Light Company*, 122 NLRB 293, 296.

Appendix A

Regional Director's Decision and Direction of Elections

(B) If a majority of the professional employees do not vote for inclusion in a unit with the technical employees, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All technical employees in the Employer's Thermo-Electric Division at its Newark, New Jersey plant, excluding all other employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

DIRECTION OF ELECTIONS[11]

Separate elections by secret ballot will be conducted by the undersigned Regional Director among the employees in the voting groups described above in paragraph 4, at the time and place set forth in the notice of elections to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and

11. See footnote 8, *supra*.

Appendix A

Regional Director's Decision and Direction of Elections

employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible in voting group (1) shall vote whether or not they desire to be included with the nonprofessional (technical) employees and whether or not they desire to be represented for collective bargaining purposes by International Union of Electrical, Radio and Machine Workers, AFL-CIO. Those eligible in voting group (2) shall vote whether or not they desire to be represented, for collective bargaining purposes, by International Union of Electrical, Radio and Machine Workers, AFL-CIO.

JOHN J. CUNEO
Regional Director for the 22nd Region

Dated November 13, 1961
at Newark, New Jersey

APPENDIX B

Statute, Rules and Regulations, and Statements of Procedure Involved

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*)—

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided, That* the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) * * *; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record

required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

National Labor Relations Board, Rules and Regulations, Series 8, as amended (29 C. F. R. 102.1, *et seq.*)—

"SUBPART C—PROCEDURE UNDER SECTION 9(c) OF THE ACT FOR THE DETERMINATION OF QUESTIONS CONCERNING REPRESENTATION OF EMPLOYEES

"§ 102.60 **Petition for certification or decertification; who may file; where to file; withdrawal.**

A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. * * *"

"§ 102.63 **Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.**

After a petition has been filed, if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will

reflect the free choice of employees in the appropriate unit, he shall prepare and cause to be served * * * a notice of hearing * * *. * * *"

"§ 102.64 **Conduct of hearing.**

(a) * * * It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge *their* duties under section 9(c) of the act."

"§ 102.67 **Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.**

(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. * * *.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file seven copies of a request for review with the Board in Washington, D. C. * * *

(c) The Board will grant a request for review only where compelling reasons exist therefor. According

ly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

• • •

(g) • • • Where review has been granted, the Board will consider the entire record in the light of the grounds relied upon for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

• • •

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

Appendix B

§ 102.68 **Record; what constitutes; transmission to Board.**

The record in the proceeding shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and any briefs or other documents submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board."

National Labor Relations Board, Statements of Procedure (29 C. F. R. 101.1, *et seq.*)—

"SUBPART C—REPRESENTATION CASES UNDER SECTION 9(c) OF THE ACT

§ 101.17 **Initiation of representation case.**

The investigation of the question as to whether a union represents a majority of an appropriate grouping of employees is initiated by the filing of a petition by any person or labor organization acting on behalf of a substantial number of employees or by an employer when one or more individuals or labor organizations present him a claim to be recognized as the exclusive bargaining representative. . . . If a petition is filed by a labor organization or in the case of a petition to decertify a certified or recognized bar

gaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation. Such evidence is usually in the form of cards authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification proceeding.

§101.18 **Investigation of petition.**

(a) Upon receipt of the petition in the regional office, it is docketed and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) the appropriateness of the unit of employees for the purposes of collective bargaining and the existence of a bona fide question concerning representation within the meaning of the act, (3) whether the election would effectuate the policies of the act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner. It is being the Board's administrative experience that in the absence of special factors the conduct of a election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation

on the part of the labor organization claiming a majority is required and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. * * *"

"§ 101.20 **Formal hearing.**

(a) If no informal adjustment of the question concerning representation has been effected and it appears to the regional director that formal action is necessary, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues, which is followed by a decision and direction of election or dismissal of the case."

"§ 101.21 **Procedure after hearing.**

(a) Pursuant to section 3(b) of the act, the Board has delegated to its regional directors its powers under section 9 of the act, to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof. * * *"

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 555

GENERAL INSTRUMENT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15a-20a) is reported at 319 F. 2d 420. The Board's decision and order in the unfair labor practice case (Pet. 21a-29a) are reported at 140 NLRB No. 6. The Board's decision and direction of election in the representation case (Pet. 32a-34a), and its order denying reconsideration (Pet. 30a-31a), are unreported.

JURISDICTION

The decree of the court of appeals (Pet. 13a-14a) was entered on June 3, 1963. Its order denying rehearing (Pet. 1a) was entered on July 17, 1963. The

petition for a writ of certiorari was filed on October 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 2101.

QUESTION PRESENTED

Whether the Board abused its discretion under Section 9(b) of the National Labor Relations Act in finding that the technical employees in the Thermo-Electric Division of the Company's Newark plant constituted an appropriate unit for purposes of collective bargaining.

STATUTE

The relevant provisions of the National Labor Relations Act are set forth in Appendix B to the petition.

STATEMENT

A. The Board's Findings and Conclusions

Petitioner manufactures electronic devices at its plant in Newark, New Jersey (J.A. 9).[1] The Thermo-Electric Division in that plant prepares technical proposals and technical reports (J.A. 10). Fifteen employees of this division are laboratory workers, and the remaining seventeen are engineers. For purposes of classification of bargaining units, the laboratory workers come within the category of "technical employees," while the engineers are "professional employees." (J.A. 10, 15-16.)

On September 11, 1961, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein the IUE or the Union, filed a representation petition under Section 9(c) of the Act. Pursuant to

[1] "J.A." references are to the Joint Appendix printed for the use of the court below and filed with the petition.

its petition as amended during the proceeding, the Union sought to represent a unit consisting solely of the technical employees in the Company's Thermo-Electric Division. The Company, on the other hand, sought a unit composed of both the technical and the professional employees. (J.A. 9-10, 22.) The Regional Director found that the professional employees (the engineers) were paid on a salaried basis, all performed duties which required the exercise of discretion and independent judgment, and all had a graduate engineering degree or its equivalent, or were matriculating toward such a degree (J.A. 10-12, 15-16). He found that the technicians (the laboratory workers) were all hourly rated employees, worked under the guidance of the engineers, and did not have the advanced educational training possessed by the engineers (J.A. 12-14). Nevertheless, the Regional Director concluded that, since both groups of employees worked in the same general area and in close collaboration, the technical and the professional employees taken together would constitute an appropriate unit (J.A. 14-15). He directed that separate elections be held in each of the two groups; that the professionals be polled not only on whether they desired the Union but also on whether they desired to be in the unit with the technicals; that, if the professionals voted for inclusion, their votes on the Union would be counted; that, if the professionals voted against the inclusion, the technical employees alone would constitute the appropriate unit.[2] (J.A. 9-10, 17-19.)

[2] Section 9(b)(1) of the Act provides that the Board may not include professional employees and non-professional employees in the same unit "unless a majority of such professional employees vote for inclusion in such unit."

On review of the Regional Director's Decision and Direction of Election, the Board reached a contrary conclusion. Although the Board accepted the Director's findings of fact, it found that the technical employees comprised a sufficiently homogenous and distinct grouping of employees to constitute, by themselves, an appropriate unit and it held that a unit of technicals alone was appropriate here (J.A. 22, 28). Accordingly, the Board vacated the election which had been held in the professional employees' voting group and directed that only the votes of the technicians' group be counted (J.A. 23). The Company filed a motion for reconsideration which was denied by the Board (J.A. 28-29). Meanwhile, the Regional Director, finding that a majority of the employees in the technicians' group had voted for the Union, certified the Union as the bargaining representative of the technical employees (J.A. 24-26).

The company then refused to bargain with the Union on the ground that the bargaining unit was invalid, and a complaint was issued alleging that the refusal violated Section 8(a)(5) and (1) of the Act. The Board, after hearing, sustained the complaint and ordered the Company to bargain with the Union. (J.A. 30-34, 56-63.)

B. The Decision of the Court of Appeals

The court of appeals held that the Board did not exceed its authority under Section 9(b) of the Act in finding that the technical employees alone constituted an appropriate unit. The court therefore enforced the Board's order in full. (Pet. 15a-20a.)

ARGUMENT

The decision of the court of appeals is correct, and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. This Court has recognized that Section 9(b) of the Act confers upon the Board broad discretion in respect to defining what shall constitute an appropriate unit for purposes of collective bargaining, and that the Board's unit determination is entitled to stand unless it is plainly unreasonable. *May Department Stores* v. *National Labor Relations Board*, 326 U.S. 376, 380; *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491. The court below correctly concluded that there was ample basis for the Board's finding that a unit of technicals alone constituted an appropriate unit in this case. As the court pointed out (Pet. 18a): "Working conditions, hourly wage scales, job specifications, and advancement opportunities indicate that the technicals have a strong common bond; different levels of education, job specifications; wage basis, advancement opportunities and, significantly, professional status, support a finding that sufficient distinctions between the technicals and the professionals exist to support a separation."[3] Nor is it relevant that a unit of both technical

[3] The Board has frequently found that, because technical employees differ from other employees in interests, background, and function, a separate unit of technicals is appropriate, particularly where it is petitioned for. See, *e.g.*, *Armstrong Rubber Co.*, 144 NLRB No. 144, 54 LRRM 1197; *Meramec Mining Co.*, 134 NLRB 1675, 1676-1677; *Litton Industries of Maryland, Inc.*, 125 NLRB 722, 724-725; *Boston Edison Co.*, 51 NLRB 118, 121. The Board has found a unit of technicals to be appropriate even where, as here, it was contended that the technicals should be combined with professional employees. See *Tele-Dynamics Division, American Bosch Arma Corp.*, 132 NLRB 748; *DIFCO Laboratories, Inc.*, 129 NLRB 887; *Vickers, Inc.*, 124 NLRB 1051.

and professional employees might also have been appropriate. The fact that the Board has selected one appropriate unit rather than another merely shows that the Board has exercised its discretion under the Act, not that it has abused it.[4]

2. Petitioner's contention (Pet. 9-13) that the Board's unit determination depends on the circumstance that it was the union rather than the employer who filed the petition rests on an erroneous premise. The Regional Director, in finding that a combined unit of technicals and professionals was appropriate, relied on *Reynolds Electrical and Engineering Co.*, 133 NLRB 113 (J.A. 17, n. 7), where the Board had placed technical and professional employees in one unit although the union had only claimed to represent certain technicals.[5] Reversing the Regional Director, the

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[4] See, *e.g.*, *Mountain States Telephone and Telegraph Co.* v. *National Labor Relations Board*, 310 F. 2d 478, 480 (C.A. 10); *National Labor Relations Board* v. *Local 19, International Brotherhood of Longshoremen*, 286 F. 2d 661, 664 (C.A. 7), certiorari denied, 368 U.S. 820; *National Labor Relations Board* v. *Burroughs Corp.*, 261 F. 2d 463, 466-467 (C.A. 2).

[5] In *Reynolds*, the employer had a medical division which included 15 first-aid attendants, a laboratory technician, an X-ray technician, 2 nurses, and a pharmacist. The union demanded recognition for the 15 first-aid attendants, and the employer filed a petition for an election among these attendants. At the hearing, the employer in effect amended his petition, contending that the appropriate unit was the entire medical division. The Board found that the unit sought by the union was not appropriate because it did not include all the technicals, omitting the laboratory and X-ray technicians. The Board concluded, however, that the unit sought by the employer—which included all of the technical employees and also the nurses and the pharmacist, who were professional employees—was an appropriate one. Since the union did not object to representing the larger unit, the Board directed an election in that unit, giving the professionals an opportunity to vote separately on whether they desired to be included.

Board pointed out that *Reynolds* was "distinguishable on its facts," and added that there "the Employer-Petitioner sought a departmental unit which included both professional and technical employees, and no showing of interest was required" (J.A. 22, n. 3). Singling out this last statement, petitioner concludes that the sole reason for the difference between this case and *Reynolds* is that here the representation petition was filed by the union while there it was filed by the employer. However, *Reynolds* is distinguishable from the instant case for reasons entirely unrelated to the showing-of-interest requirement, which applies only to petitions by labor organizations.

As the Board emphasized (J.A. 22), the Union here "seeks to represent only the technical employees and does not desire to represent the professionals." In *Reynolds*, on the other hand, although the union originally made a representation claim limited to some of the technical employees, it did not object to representing the professionals (see *supra*, p. 6 n. 5). In a case such as this one, where a union does not desire to represent a group of employees, the Board will not force it to do so, whether the petition be filed by the union or by the employer. Unless, as in this case, an appropriate unit can be established without the inclusion of the group disclaimed by the union, the Board will dismiss the petition.[6] Thus, the fact that the union in *Reynolds* did not object to representing the professional employees, whereas the Union here

[6] For cases where the Board has taken the willingness of the union to represent the employees into account even though the employer filed the petition, see, *e.g.*, *Restaurant & Tavern Owners Association of Salem*, 126 NLRB 671; *The Housatonic Public Service Co.*, 111 NLRB 877; *Coeur D'Alene Grocers Association*, 88 NLRB 44; *Ny-Lint Tool & Manufacturing Co.*, 77 NLRB 642.

did, affords a substantial basis for distinguishing the two cases.

This ground of distinction obviously does not depend on whether the employer or the union filed the petition. Similarly, it does not depend upon whether the union has made a showing of interest among the employees excluded from the unit chosen by the Board, although a lack of any showing of interest among a discrete class of employees is some evidence of the union's unwillingness to represent this class.[7]

3. There is likewise no merit to petitioner's contention (Pet. 14-19) that the Board's unit finding is contrary to Section 9(c)(5) of the Act, which provides that extent of organization shall not be "controlling" in determining whether a unit is appropriate. Even assuming that the Board considered the extent of organization, Section 9(c)(5) does not preclude the Board from taking account of this factor in choosing between two appropriate units but merely from using it as the sole basis for finding that a unit is appropriate. Since, as we have shown above (pp. 3, 5), the unit of technical employees was otherwise appropriate on the basis of objective factors long accepted as legitimate, the Board would not violate Section

[7] Since in this case the Board concluded even without reference to the Union's showing of interest that the Union did not wish to represent professional employees, the Board's choice between appropriate units did not depend upon the fact that the Union made a showing of interest only among the technical employees. The Company was therefore not prejudiced by its inability to contest the validity of that showing (see Pet. 20-21). In any event, petitioner's contention that it was prejudiced comes too late since it was not asserted in the court below. See *Lawn* v. *United States*, 335 U.S. 339, 362, n. 16; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Sec. 418 (2d ed., Wolfson & Kurland, 1951).

9(c)(5) by treating both the extent of organization and the Union's unwillingness to represent the professional employees as reasons for preferring this unit to that chosen by the Regional Director.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE GOLD,
Attorney,
National Labor Relations Board.

NOVEMBER 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963—712691/P O 426

Office-Supreme Court, U.S.
FILED
NOV 27 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 555

GENERAL INSTRUMENT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

MURRAY GARTNER
Attorney for Petitioner
598 Madison Avenue
New York 22, New York

IN THE

Supreme Court of the United States

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GENERAL INSTRUMENT CORPORATION,

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NATIONAL LABOR RELATIONS BOARD,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

The Brief in Opposition of the National Labor Relations Board mis-states the facts to write out of this case the legal issues in the case which require review. It then tells the Court that this is an ordinary case of the Board's exercise of its discretion to choose between two possibly appropriate units and, therefore, that it merits no review.

The Court of Appeals, obviously troubled by the way in which the Board had found the unit of technicals alone, to be appropriate (*i.e.*, the Board said that *because* the union sought to represent only the technicals and had no

showing of interest among the professionals, the technicals, alone, constituted an appropriate unit), attributed to the Board findings which the Board did not make. (See Pet. 17.) Now the Board's brief goes even further in asserting non-existent findings in support of its decision.

The Board's brief says that, in its decision of March 27, 1962 (Pet. 32a-34a), "it found that the technical employees comprised a sufficiently homogeneous and distinct grouping of employees to constitute by themselves an appropriate unit. * * *" (Br. in Op. 4). Neither at the places cited in the Board's brief (J. A. 22, 28) nor at any other place in the Board's decision (Pet. 32a-34a) will this alleged finding be found. In fact, this Board statement is a paraphrase of a directly contrary finding which *was* made by the Regional Director, and adopted by the Board. (Pet. 33a.) The actual finding was that the evidence "establishes that the employees in the Employer's Thermo-Electric Division [*i.e.*, both the professionals and technicals] constitute a homogeneous, clearly identifiable group with distinctive work interests * * *"[1] (Pet. 42a).

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1. The Regional Director made this finding because of his five pages of detailed findings (Pet. 37a-42a) which establish the inseparability of professionals and technicals in their work, not, as the Board's brief would have the Court believe, *despite* two sentences of inaccurately stated findings (Br. in Op. 4). The evidence, summarized by the Regional Director, was that

> "The record revealed that all employees in the Thermo-Electric Division receive the same holidays, hospitalization and family death benefits. The hourly rated laboratory employees receive a $1000 life insurance policy, while those in the engineering classifications receive a life insurance policy based on their salaries which, in all cases, is higher than $1,000. All of the employees punch time clocks except the project engineers. The laboratory employees receive overtime as do junior engineers earning less than $90 per week. All these employees work in the same general area, and all work in close collaboration as a team in the performance of their duties under the general super-

The Board's brief mis-states the decision of the Court of Appeals just as it mistakenly reports the findings of the Board and the reasons which it gave for its decision. The brief says that "The court of appeals held that the Board did not exceed its authority under Section 9(b) of the Act in finding that the technical employees alone constituted an appropriate unit" (Br. in Op. 4). The Court of Appeals, however, justified the Board's decision in the following way: "The Board's decision, which rejects the Director's choice of the larger unit for policy reasons not considered by the Director, is amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision that a unit of the technicals alone would be an appropriate unit." (Pet. 20a.)

The Court of Appeals, in other words, recognized that the Board's decision was not made on the basis of an assessment of factors of appropriateness, but "for policy reasons." Those policy reasons, the impropriety of which is fully discussed in the petition, were that the representation petition had been filed by the union rather than by the employer and that the union had made no showing of interest in the professionals. (Pet. 9-13.) The Court of Appeals expressly said that if these policy reasons were the "sole basis for the Board's decision, a serious question

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vision of Barnat. The record shows that employees in the engineering classifications perform every operation in the division and that the laboratory employees at times perform work normally considered to be engineering work, such as heat transfer analysis, computer quoting, calculations of a complex nature, drafting and designing work and buying of parts and equipment. It also appears that frequently, where more than one employee is required for an operation, an engineer and a technician work together jointly rather than two technicians or two engineers. It is also a common occurrence to have senior engineers, senior technicians and laboratory technicians work side by side performing the same work." (Pet. 41a-42a.)

as to the validity of the Board's order would result." (Pet. 19a.) In saying, however, that the Board's decision was otherwise "amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision," the Court of Appeals, as the petition shows, erroneously relied on findings which the Board did not make and reasons which the Regional Director did not give for a non-existent alternative decision. (Pet. 16-17.)

In its point numbered "1," the Board's brief quotes from the opinion of the Court of Appeals that some of the factors found by the Regional Director and adopted by the Board "support a finding that sufficient distinctions between the technicals and the professionals exist to support a separation." (Br. in Op. 5.) This part of the opinion of the court below merely emphasizes that it tried to justify the Board's decision, which expressly was based only on what the Court of Appeals called "policy reasons," by suggesting a finding which the Board could have made—but the Board did not make that finding and the Court of Appeals does not say that it did. The Board's brief again, in the same vein, distorts the Board's decision by saying that the Board "selected one appropriate unit rather than another" when, in fact, what the Board did was to exclude the professionals from the unit found appropriate for "policy reasons," and thereupon find the truncated unit appropriate, not for any reasons which it assigned, but simply because the technicals were all that were left after the professionals were excluded.

Continuing its efforts to assign new and plausible reasons for its decision, to replace the insupportable one on which the Board actually based its decision, the Board's

brief, in its point numbered "2," says that "the fact, that the union in *Reynolds* did not object to representing the professional employees, whereas the Union here did, affords a substantial basis for distinguishing the two cases." (Br. in Op. 7-8.) The difficulty with that distinction is twofold: (1) the Board's decision did not make it; once again, there is an effort by the Board, in its brief, as there was throughout the opinion of the Court of Appeals, to mend hold, to assign a different ground for decision in place of the true and defective ground; and (2) it is, in any case, not true.

(1) The Board's brief notes that, in its decision, the Board distinguished *Reynolds* by saying that "the Employer-Petitioner sought a departmental unit which included both professional and technical employees, and no showing of interest was required": (Br. in Op. 7). With disingenuous accusation, the Board's brief goes on: "Singling out this last statement, petitioner concludes that the sole reason for the difference between this case and *Reynolds* is that here the representation petition was filed by the union while there it was filed by the employer." (Br. in Op. 7.) The fact is that the statement which is alleged to have been "singled out" is the *only* statement which the Board made about *Reynolds*. And it was not the petitioner who "concluded" that the basis of the Board's decision was that the filing party was the union rather than the employer; it was the Board which gave that reason.

Now, in its brief, the Board does not try to defend that reason. It says "*Reynolds* is distinguishable from the instant case for reasons entirely unrelated to the showing-of-interest requirement * * *" (Br. in Op. 7). The new

reasons which the Board assigns—surely because it recognizes that the old reason is indefensible—are that, in *Reynolds*, the union did not object to representing the professionals (Br. in Op. 6 n. 5, 7) and, in this case, the union did (Br. in Op. 7). Both premises are untrue. There is nothing in *Reynolds* to support the statement that the union there did not object to representing the professionals, and the Board's brief cites nothing. In an interesting exercise in self-generating authority, the Board's brief makes the unsupported statement of the *Reynolds*' union's lack of objection (Br. in Op. 6 n. 5) and then supports the reiterated statement by reference to its earlier footnote (Br. in Op. 7: "see supra, p. 6 n. 5").[2]

(2) Moreover, in this case, it simply is not true that the union objected to representing the professionals. On the contrary, the Regional Director was unaware of any such objection since, in his decision, he gave the union ten days in which to request withdrawal of the petition "If the Petitioner is unwilling to represent professional employees in the same unit with technical employees * * *" (Pet. 44a, n. 8). And in its "Brief in Support of Request for Review"[3] the union stated its willingness to represent the pro-

2. Had the union in *Reynolds* objected to representing the professionals, the four cases cited in footnote 6 of the Brief in Opposition would have required dismissal of the employer's petition. Those cases hold only that a union's unwillingness to represent some of the employees in an appropriate unit is reason, not (as the Board's brief would have it here) for finding the balance of those employees to be an appropriate unit, but for dismissing the employer's petition. In *Ny-Lint Tool & Manufacturing Co.*, 77 NLRB 642, the employer's petition was dismissed even though the union claimed a unit in a unit smaller than that sought by the employer.

3. Item 5 of Volume III on the Certified List of the National Labor Relations Board, part of the Transcript of Record certified by the court below.

fessionals, if the professionals voted for it.[4] Since, therefore, both premises of the new distinction of *Reynolds* put forward by the Board in its brief are invalid, neither its decision nor that of the Court of Appeals can be supported by it any more than by the original distinction which the Board attempted in its decision and which it chose not to defend in its brief.

In its point numbered "3," the Board's brief again uses hypothetical grounds to explain away its actual decision. Petitioner's objection that the Board allowed extent of organization to be controlling in its decision is based on what the Board *said* in its decision. (Pet. 17-19.) The Board, in its brief, now says, however, "Since * * * the unit of technical employees was otherwise appropriate on the basis of objective factors long accepted as legitimate, the Board would not violate Section 9(c)(5) by treating both the extent of organization and the Union's unwillingness to rep-

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4. The union urged:

"The fifteen technical employees Petitioner [the union] seeks to represent constitute one of several appropriate units, and the Board should direct an election in the manner following:

1. In the event a majority of the technical employees select Petitioner and a majority of the professional employees elect to join the overall unit, the technical employees shall be an appropriate unit;

2. In the event a majority of the technical employees select the Petitioner and a majority of the professional employees elect to join the overall unit but do not select the Petitioner, the technical employees shall nevertheless be an appropriate unit;

3. In the event a majority of the technical employees select the Petitioner and a majority of the professional employees elect to join the overall unit and also select the Petitioner, a unit of professionals and technicals shall be an appropriate unit;

4. In the event a majority of the technical employees do not select the Petitioner, the votes of the professionals will be of no consequence, since no showing of representation has been made and representation will be denied in all respects."

resent the professional employees as reasons for preferring this unit to that chosen by the Regional Director" (Br. in Op. 8-9). The question in this case is not whether the Board *would* have violated Section 9(c)(5) if it had made findings which the Board's brief now, contrary to the fact, says it made, and if it had then referred only incidentally to the lack of showing of interest. The question is whether the Board's decision does not conclusively show that it violated Section 9(c)(5) since the only, and, therefore, controlling, reason which it gave for its decision was the lack of showing of interest. Even the Board, in its brief, cannot make a separate ground out of the alleged unwillingness of the union to represent professionals,[5] but is compelled to fall back on the "lack of any showing of interest" as "some evidence of the union's unwillingness to represent * * * [professionals]." (Br. in Op. 8.)

The entire effort and purpose of the Board's brief is directed to erasing the fact that the Board, in the decision and order which the Court of Appeals enforced, relied solely on lack of showing of interest among the professionals as its reason for finding the technicals alone appropriate. Furthering this purpose, the Board's brief puts forward other, new, grounds for the Board's decision which are deficient in themselves, as we have shown, and which, in any event, cannot be used to support the decision now since they were not in fact the basis of the decision.

In its last and most flagrant mis-statement and avoidance of the issues in this case, the Board's brief uses a footnote as pretended answer to petitioner's Point 3. The brief says "* * * the Board's choice between appropriate units did not depend upon the fact that the union made a showing of interest only among the technical em-

5 See pp. 6-7, *supra*.

ployees. The company was therefore not prejudiced by its inability to contest the validity of that showing (see Pet. 20-21"). (Br. in Op. 8, n. 7.) Despite the repeated contrary assertions of the Brief in Opposition, it is undeniable that the Board used the lack of showing of interest as ground for its decision. Petitioner does not urge that it was prejudiced because it was not allowed to contest the validity of the showing. What petitioner urges, in its Point 3, is that it was entirely improper for the Board to use as *any* basis for its decision material which was not, and could not be, under the Board's rules, any part of the record in the case. Contrary to what the Brief in Opposition says, this contention *was* made in the court below.[6]

Conclusion

The Board's brief is a sustained effort to mend holes—to avoid the impossible task of defending the Board's true decision and to join the Court of Appeals in postulating another decision which it says could have been made and which is easier to defend. The three reasons for granting the writ based on the Court of Appeals' erroneous efforts to save the Board's true decision remain unrebutted. We submit the Board's egregiously transparent attempt to make the case appear other than it is emphasizes the need for review. The petition for certiorari should be granted.

Respectfully submitted.

MURRAY GARTNER
Attorney for Petitioner

November 26, 1963

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6. Petitioner's Brief in the Court of Appeals, p. 31: "This Court will not find the 'showing of interest' on which the Board relied in the record of the representation case which has been certified here—such administrative matters are not made part of the 'formal record.'"